85-1229

CASE NO.

Supreme Court, U.S.
FILED
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

William S. Russell,
William M. Hetherington,
Robert E. Henry,
Daniel J. Houlihan, and
Ronald E. Oswill,

PETITIONERS

-vs-

DEPARTMENT OF TRANSPORTATION, FAA

ON A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

MARK E. BECK
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Questions Presented

1. IS THE STANDARD THE COURT USED TO APPLY SANCTIONS HERE, NAMELY, "BECAUSE THE ARGUMENTS OF PETITIONERS ARE ADEQUATELY MET BY THE PRECEDENTS OF THE LEAD CASES AND/OR ARE PATENTLY FRIVOLOUS IN LIGHT OF THE RECORD BEFORE THE COURT" IMPERMISSABLY VAGUE AND ERRONEOUS?

2. DOES THE IMPOSITION OF SANCTIONS IN THIS CASE CREATE A PRECEDENT WITH SUBSTANTIAL LIKELIHOOD OF CHILLING THE FIRST AMENDMENT RIGHTS OF LITIGANTS AND THE PROFESSIONAL DUTY OF COUNSEL TO ZEALOUSLY ADVOCATE A CLIENT'S CAUSE?

3. DID THE FAA FAIL TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT PETITIONERS WERE PARTICIPATING IN A STRIKE, I.E. THAT PETITIONERS WERE ABSENT FROM WORK VOLUNTARILY AND WITH THE INTENT TO ACT "IN CONCERT" WITH OTHERS?

4. DID THE GENUINE FEAR OF HARM ON THE PART OF PETITIONERS, WHETHER REASONABLE OR NOT, CONSTITUTE A DEFENSE TO THE CHARGE OF STRIKING?

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The text of these and other relevant statutes is found in an Appendix, which has been separately filed concurrently with this Petition.

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OPINIONS BELOW

To the best of counsel's knowledge, the Decisions of the Presiding Officials of the Merit Systems Protection Board ("MSPB" or "Board") (Appendix "G") and the Opinions of the MSPB (Appendix "H") are unreported. The consolidated opinion

of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") (Appendix "I") has not yet been reported.

JURISDICTION

The judgment of the Federal Circuit in case nos. 85-1128, 85-1129, 85-1130, 85-1131 and 85-1132 was rendered and entered on August 30, 1985. A Petition for Rehearing was filed in each case and, on October 17, 1985, it was denied as to each case.

This Court has jurisdiction over this consolidated Petition for Writ of Certiorari pursuant to Title 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

Petitioners request Supreme Court review of the August 30, 1985 decision of the Federal Circuit, which affirmed

decisions made by the MSPB sustaining Petitioners' removal from their positions as air traffic control specialists. The MSPB had affirmed [1] the decision of the Department of Transportation, Federal Aviation Administration ("FAA") to remove the controllers.[2]

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1 On September 30, 1983, the Board sustained a decision to remove Ronald E. Oswill, and William M. Hetherington. On January 19, 1984, in separate opinions, the Board sustained a decision to remove Robert E. Henry, Daniel G. Houlihan and William S. Russell.

2 Ronald Oswill's removal was effective August 31, 1981 and the ruling of the Board's Presiding Official was made after testimony taken at hearings held November 5, 1982, November 23, 1982 and November 30, 1982. William M. Hetherington's removal was effective August 31, 1981 and the ruling of the Presiding Official was made after testimony was taken at hearings held November 5, 1982 and November 23, 1982. William S. Russell's removal was effective August 28, 1981 and the ruling of the Presiding Official was made after testimony taken

(footnote continued on next page)

Four of these five controllers had held their positions between eight and ten years while one had been employed for two years.[3] During their tenure as controllers, each repeatedly was lauded by his superiors for exemplary performance and promoted to more advanced job assignments.

During the period of Petitioners' employment, the Professional Air Traffic Controllers Organization ("PATCO") grew

(footnote 2 continued)
at hearings held November 1, 1982 and November 5, 1982. Daniel J. Houlihan's removal was effective August 28, 1981 and the ruling of the Presiding Official was made after testimony taken at hearings held November 5, 1982 and December 2, 1982. Robert Henry's removal was effective August 28, 1981 and the ruling of the Presiding Official was made after testimony taken at hearings held November 2, 1982 and December 2, 1982.

3 The facts set forth in this Statement of the Case are drawn from the briefs filed in each of the five consolidated cases. Those briefs were supported by citations to the respective records. Accordingly, in the interests of brevity and space, citations are not included except in the case of particularly significant facts.

in importance as a bargaining agent and advocate of management reform for all controllers. Throughout the nation many controllers and their supervisors became ardent union activists and placed great pressure upon other controllers, including each Petitioner, to join PATCO. Those PATCO representatives made it very clear to Petitioners that further promotion as a controller and the necessary cooperation of co-workers in the control tower was contingent upon Petitioners' joining and supporting the union.

To each of these Petitioners, those threats were very real. The job of controller requires extremely close cooperation with other controllers in the tower. For example, a controller may not allow a plane under his control to enter the air space of another controller, as he often must, without the other controller's consent. A

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controller who does not work well with his associates could not, therefore, adequately and safely do his job.

As early as the spring of 1981, the pressure from supervisors and controllers loyal to PATCO was intensified and directed toward inducing other controllers, including each Petitioner, to support the impending work action. Petitioners justifiably feared various degrees of physical violence against themselves and their families if they did not join the strikers. In four of the five cases (the exception being the case of William S. Russell) direct physical threats were made.[4]

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4 For example, William M. Hetherington was told by a PATCO loyalist that he would blow up Petitioner's home if he failed to support the strike. (R.T. [11/23] at 106, 117, App. at 3-5, 10-12) Daniel J. Houlihan was repeatedly warned that he would be physically injured if he crossed the picket line and one ardent PATCO supporter threatened to shoot him. (R.T. [12/2] at 56-59, 72,

(footnote continued on next page)

On August 3, 1981, a work action was called by Robert Poli, the President of PATCO. While none of the Petitioners supported the work action, they each feared for their lives and the safety of their families as well as for their ability to safely and competently perform as controllers in the future if they attempted to defy PATCO. Accordingly, each Petitioner declined to report to work for several days.

On August 3, 1981, the FAA took the

(footnote 4 continued)
App. at 4-8, 10-11, 12-13, 15) In addition to receiving direct threats, Ronald E. Oswill was pushed and shoved while at his tower position and frightened by vandalism in his neighborhood which he feared was directed at his family. (R.T. [11/30] at 144, App. at 2-8, 21-25) These and other instances of threats were well documented in each of Petitioner's Briefs to the Court of Appeals for the Federal Circuit. (Note: The numbers in the brackets above refer to the dates of the hearings described in footnote 2, supra. "App." in this footnote refers to the Appendix filed with each Petitioner's opening brief to the Federal Circuit.)

position that any controller who did not report to work within 48 hours would be terminated.

Between August 5 and August 12, 1981, each Petitioner received a form letter from the FAA advising him that the FAA intended to remove him from his position as a controller for having participated in the strike and having been absent without leave. Between August 21 and August 28, 1981, each Petitioner received another form letter from the FAA advising him that he was removed from employment for the reasons articulated in the earlier FAA letter.

The officials who dispatched the proposal and removal letters testified at the MSPB hearings that because a nationwide strike had been called and each Petitioner was absent during that period, the officials believed each Petitioner had engaged in a strike.

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None of the officials considered probative the substantial evidence of coercion which was suffered by Petitioners and which resulted in their AWOL status. Nor did the officials consider probative the fact that none of the Petitioners had ever advised anyone that they affirmatively supported the work action or that they intended to act "in concert" with others in withholding their services from the FAA.

After the MSPB rejected a host of arguments made by Petitioners, counsel for the controllers studied the MSPB decisions and ultimately decided that only one issue merited review by the Court of Appeals for the Federal Circuit, namely, whether the FAA failed to meet its burden of establishing by a preponderance of the evidence that Petitioners had participated in a strike.[5] That issue was fully briefed and formed the basis of each Petition-

er's appeal to the Federal Circuit.

After considering the briefs and hearing oral argument, the Federal Circuit consolidated the five cases into one opinion and, in a paragraph devoted to each Petitioner, summarily affirmed the decisions of the MSPB.

In addition, in each of the five appeals, the Federal Circuit imposed sanctions of $500.00 against Petitioners and counsel, jointly and severally, because "the arguments of the Petitioner are adequately met by precedents in lead cases and/or are patently frivolous . . ." (Appendix "I".)

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5 In Notices of Appeal filed in these cases, several issues were designated for review but subsequently deleted by counsel from briefing and consideration by the Federal Circuit because counsel determined that the "lead cases" had disposed of those issues. Additionally, counsel determined that the cases of only five of the six controllers he represented contained issues which warranted review by the Federal Circuit. See Petition for Rehearing and Suggestion for Rehearing in Banc ("Petition for Rehearing").

This order came as quite a shock to Petitioners and their counsel, the Law Office of Mark E. Beck, A Professional Corporation.[6] Counsel had begun representing six fired air traffic controllers in February, 1983 and had done so at a substantially reduced fee based upon a conviction that the controllers' issues were important and needed to be heard. It was no surprise to Petitioners and counsel that Petitioners' claims were rejected at the MSPB level, given the subtlety of the issues involved and the volume of air traffic controller cases before that body. Therefore, the controllers and their counsel looked forward to review of their cases by an Article III court, expecting in such proceedings a careful and discriminating review of the merits of each case.

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6 Petitioners' Petitions for Rehearing, each supported by the Declaration of Mark E. Beck, provide the principal basis for the remaining facts set forth in this Statement of the Case.

Although approximately 12,000 air traffic controllers had been fired, the Federal Circuit apparently felt that ten "lead cases" (which were decided months before all other controller appeals) would provide sufficient precedent to adequately address all possible issues in air traffic controller litigation. In preparation for review by the Federal Circuit, counsel invested many hours studying each of those "lead cases" and applying the law and facts of those cases to the cases of the six controllers whom counsel represented. Only two of the "lead cases" addressed the issue of coercion (Johnson and Martel)[7] and only three such cases analyzed the "in concert" element of a charge of striking. (Schapansky, Letenyei and

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7 Johnson v. Department of Transportation, 735 F. 2d 510 (Fed. Cir. 1984); Martel v. Department of Transportation FAA, 735 F. 2d 504 (Fed. Cir. 1984).

Johnson).[8] Moreover, those relevant cases contained material facts distinguishing them from each of Petitioners' cases. This is not surprising, of course, because defenses of coercion or failure to act "in concert" with others inherently depend upon a set of facts unique to each Petitioner.

Having invested considerable time and effort in determining which issues were not precluded by "lead cases" and in considering how to present those issues as persuasively as possible, counsel for Petitioners was surprised to receive three form letters from the clerk of the Federal Circuit -- two even before opening briefs were ever filed -- warning that sanctions would be imposed for frivolous prosecution of appeals. (See Appendix "F.") Counsel nevertheless

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8 Schapansky v. Department of Transportation, FAA, 735 F. 2d 477 (Fed. Cir. 1984); Letenyei v. Department of Transportation, FAA, 735 F. 2d 528 (Fed. Cir. 1984); Johnson, supra, Footnote 7.

remained convinced, based on professional judgment and litigation experience, that the appeals were meritorious.

First, simply put, counsel could not understand how appeals asserting defenses based upon unique sets of facts could be deemed frivolous when the specific facts at issue had not been considered previously by the Federal Circuit.

Second, the relief sought by Petitioners was substantial, not frivolous or insignificant. A favorable disposition of Petitioners' claims would have resulted in reinstatement to their positions as air traffic controllers.

Third, the "lead cases" and sanctions cases to which the clerk of the court referred in its letters clearly were distinguishable from Petitioners' cases. (See Petitioners' Opening Briefs, Reply Briefs and Petitions for Rehearing.)

Fourth, counsel reasonably believed that Petitioners' arguments had substantial merit because many of them remained unaddressed or were only superficially treated by the FAA's boilerplate responsive briefs.

Finally, when the appeals were scheduled for oral argument, counsel was further convinced that the decision to proceed with the appeals was correct. Counsel was aware that argument was not permitted in the Federal Circuit when an appeal was deemed frivolous (Appendix "D" & "E") and a telephone call to the office of the clerk of the court had confirmed that only some air traffic controller appeals, those presumably more meritorious, were being set for argument.

Based on the foregoing, counsel, in good faith, decided to continue prosecuting the appeals with the Federal Circuit. Petitioners and counsel stand by

that decision today and seek certiorari to vindicate that decision and the controllers' rights to their jobs.

STATEMENT OF REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

There are three compelling reasons why the Supreme Court of the United States should grant certiorari in the consolidated cases of William S. Russell, et al. v. Department of Transportation, FAA (Court of Appeal Nos. 85-1128, 85-1129, 85-1130, 85-1131 and 85-1132).

1. The imposition of sanctions is simply outrageous because the arguments of the Petitioners were in no way frivolous or adequately met by the precedents of lead cases. Out of the ten lead air traffic controller cases only two even addressed the crucial defense of coercion which each Petitioner presented on appeal to show he did not stay home voluntarily. Further,

only three of the cases analyzed the "in concert" element that is necessary to sustain a charge that Petitioner had the requisite intent to strike.

Petitioners were confident their appeals were proper because the very facts found lacking in both Johnson and Martel were present in each Petitioner's case. Johnson, supra, 735 F. 2d at 513; Martel. supra, 735 F. 2d at 509-510. Specifically, whereas Johnson presented only vague or overheard threats of violence and Martel apparently presented no such evidence at all, each Petitioner presented evidence of specific threats of violence made directly to him and his family or similarly dramatic testimony.[9]

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9 Although Petitioner Russell received no direct threats of violence, both he and his psychiatrist presented strong objective evidence of the overwhelming fear which Russell suffered.

Additionally, the court in Martel specifically left open "the possibility that an employee's participation in the strike may be rendered involuntary, in certain exceptional circumstances involving threats of harm of a non-physical nature." 735 F. 2d at 509, n. 9. Each Petitioner presented compelling evidence of anxiety that he would never be able to safely do his job if he did not support the PATCO work action. Moreover, counsel for Petitioners compellingly demonstrated that the anxiety each Petitioner felt was more reasonable than that appearing in either Martel or Johnson.

Petitioners similarly distinguished Schapansky and Lentenyei in contending that a genuine fear of harm sufficed to negate a prima facie case of striking because each Petitioner lacked the requisite intent to withhold his ser-

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vices "in concert" with others. (See Petitioners' Opening Briefs.)

Even assuming, arguendo, the Federal Circuit decided correctly in each instance that the specific fact situations did not constitute a defense of coercion or lack of intent to strike, the Federal Circuit nevertheless erred in deciding these appeals were frivolous. No other circuit has suggested that sanctions are appropriate merely because a prior case deals with a similar fact situation and a similar issue.[10] Moreover, the Federal Circuit itself has indicated that such a standard is patently unfair to both attorneys and clients. See, e.g., Connell v. Sears, 742 F.2d. 1542, 1554

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10 See, for example, Beecher v. Able, 575 F.2d 1010 (2nd Circuit 1978); Lichtenstein v. Lichtenstein, 481 F.2d 682, (3rd Circuit 1973) cert. denied 945 S.Ct. 895 414 U.S. 1144, 39 L.Ed. 2d 98;

(footnote continued on following page)

(Fed. Cir. 1983) (holding it is proper to argue that even overwhelming contrary precedents should be overruled or distinguished).

Sanctions also were inappropriate because there is not a shred of evidence that suggests any of these Petitioners were not pursuing their appeals in good faith. Each had an extremely compelling reason to put his grievance before an Article III court, namely, to regain his position as an air traffic controller, a challenging occupation at which each of the appellants excelled for years.

Thus, the imposition of sanctions in this case is truly a miscarriage of justice. Petitioners and their counsel

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(footnote 10 continued)
Dow Chemical v. M/V Gulf Seas, 593 F.2d 613 (5th Circuit 1979); Ruderer v. Fines, 614 F.2d 1128 (7th Circuit, 1980); Underwood v. Jefferson Memorial Hospital, 639 F.2d 455 (8th Circuit 1981); and National Labor Relations Board v. Catalina Yachts, 679 F.2d 180 (9th Circuit 1982).

have been unfairly punished for, respectively, exercising their First Amendment right to petition for a redress of grievances [11] and carrying out a professional duty to zealously represent one's clients.[12]

2. The danger of allowing the Federal Circuit decision to stand here goes beyond the injustice done to these five Petitioners and counsel. The standard employed by the Federal Circuit

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11 The right to petition for redress of grievances and the right to obtain meaningful access to the courts are inherent in the First Amendment. See United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 221, 19 L.Ed. 2d 426, 430, 88 S.Ct. 353 (1967); United Transportation Union v. Michigan, 401 U.S. 576, 585, 28 L.Ed. 2d 339, 347, 91 S.Ct. 1076 (1971).

12 (See ABA Model Code of Professional Responsibility, Canon 7, EC 7-1, EC 7-2, EC 7-4, EC 7-19, DR 7-101, and DR 7-102.)

in assessing sanctions was so vague that it poses the grave threat of chilling the zealous advocacy of counsel. Additionally, the very real effect of this threat poses the unwarranted risk that the First Amendment right to petition for redress of grievances and the right to obtain meaningful access to the courts will become a hollow promise.

It is important that sufficient guidelines exist to permit attorneys to competently assess whether a particular appeal is frivolous or not. The Federal Circuit decision to sanction here serves only to muddy the waters of this rapidly developing area of the law.

The risk incurred by allowing the Federal Circuit decision to stand in this case is a grave one. In cases which contain complex issues and in which a substantial body of common law already exists, attorneys unfairly will be forced to choose between their duty

to zealously represent their client, and their desire to avoid sanctions by the court. Petitioners and their counsel recognize that a proper balance must be struck between these interests. However, it will be virtually impossible for the individual attorney to strike the balance given the impermissibly vague standard used here by the Federal Circuit.

Similarly, the vague standard employed by the Federal Circuit unfairly forces individuals to choose between risking the wrath of the court by exercising their First Amendment rights, and acquiescing in the deprivation of their rights or infringement of their interests.

Petitioners respectfully contend that these dilemmas pose an important question of federal law which the United States Supreme Court can resolve by

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providing definitive guidelines as to what constitutes a frivolous appeal.

3. Certiorari is also appropriate in these cases because it is imperative the Supreme Court of the United States rule, for the first time, upon a significant issue of law, namely: if a government employee experiences a genuine fear of harm to himself, his family members and his career, and based upon that fear absents himself from work during a strike, does his fear support a defense to a charge of striking?

In each of the five consolidated cases, Petitioners were absent from work because they feared if they reported to work during the strike called by PATCO, they would endanger themselves, their families and their careers. These Petitioners did not want to strike. The fact that they were threatened on many

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occasions indicates the extent of the reservations each had.

As such, Petitioners contend that under applicable law of the Federal Circuit they were reasonably afraid, were coerced into absenting themselves from work and, therefore, were not striking. Johnson, supra; Martel, supra.[13]

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13 The decision of the Federal Circuit summarily dismissed each Petitioner's claim by devoting one paragraph each to the issue of coercion. Petitioners respectfully submit this was utterly unsatisfactory, given the time and effort spent distinguishing each of Petitioners' cases from that of the lead cases. For example, the Federal Circuit concluded, without explanation, that Petitioner Houlihan received no direct threats. This is so despite the fact Petitioner Houlihan testified he received threats of physical violence (R.T. [12/2] 56-59, App. 4-8, 10-13, 15) including a specific threat that he might get shot if he went back to work. (R.T. [12/2] 56, 59). Another example is found in Petitioner Hetherington's case. The Federal Circuit merely asserted that Hetherington's argument on coercion lacked specifics and was fully met by the Board's opinion. However, Hetherington testified concerning

(footnote continued on following page)

Petitioners also contend that even if, arguendo, their fears were not reasonable, the genuineness of these fears sufficed to negate the "in concert" element of a charge of striking. See Johnson, supra, 735 F. 2d at 533.

In short, if the law is to be in accord with reality and simple fair play, this Court must recognize a distinction between those who voluntarily participate in an illegal strike and those, such as Petitioners, who wish to report to work, but fear the onerous consequences of defying the ardent supporters of PATCO.

(footnote 13 continued)
physical threats that ardent PATCO supporters made, including a bomb threat (R.T. [11/23] 66, 106, 117, App. 3-5, 7-12) and the very person who made the bomb threat testified he had made such a threat. In fact, counsel devoted six pages of Petitioner's opening brief before the Federal Circuit addressing the inadequate coercion analysis on which the Board relied in Hetherington's case. These two examples serve to highlight the fact that these individuals have not yet received a meaningful hearing of their grievances.

The Supreme Court of the United States, to Petitioners' knowledge, has not yet decided under what conditions fear, whether reasonable or not, can constitute a defense to a charge of striking. It is submitted that, given the facts and arguments presented, these consolidated cases are an ideal vehicle for this Court to clarify this area of the law.

Dated: January 15, 1986

By: MARK E. BECK

MARK E. BECK

CERTIFICATE OF MAILING

I hereby certify that on this date I have placed in the United States mail, postage prepaid, a true copy of the above document addressed as follows:

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Appendix B. American Bar Association Model Code of Professional Responsibility

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Appendix C. Federal Rules of Civil Procedure, Rule 11

Appendix D. Federal Rules of Appellate Procedure, Rule 34

Appendix E. Rules of the United States Court of Appeals for the Federal Circuit, Rule 15

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Appendix I. Decision of the Court of Appeals for the Federal Circuit

Appendix J. Order Denying the Petition for Rehearing

APPENDIX "A"

APPENDIX "A"

United States Constitution, Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX "D"

APPENDIX "B"

ABA Model Code of Professional Responsibility.

Canon 7 A Lawyer Should Represent A Client Zealously Within The Bound of the Law

Ethical Considerations

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law, to seek any lawful objective through legally permissible means, and to present for

adjudication any lawful claim, issue, or defense.

EC 7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applie to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public sand judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflict ing authority to areas without precedent.

Duty of the Lawyer to a Client

ED 7-4 The advocate may urge any permissi ble construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and

therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet full known, the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his

client zealously within the bounds of the law.

Disciplinary Rules.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client by being punctual in fulfilling al professional commitments, by avoiding offensive tactics, or by treating with courtesy and consid-eration all persons involved in th legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even through there is some support for an argument that the conduct is legal.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

APPENDIX "C"

APPENDIX "C"

Federal Rule of Civil Procedure.

Rule 11. Signing of Pleadings, Motions, Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, informa-

tion, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, o reversal of existing law, and that it is no interposed for any improper purpose, such a to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is no signed, it shall be stricken unless it is signed promptly after the omission is calle to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court upon motion or upon its own initiative, sha impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or othe paper, including a reasonable attorney's fe

APPENDIX "D"

APPENDIX "D"

Federal Rules of Appellate Procedure.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

APPENDIX "D"

Federal Rules of Appellate Procedure.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set o
issues has been recently authoritativel
decided; or

(3) the facts and legal arguments
are adequately presented in the briefs
and record and the decisional process
would not be significantly aided by ora
argument.

APPENDIX "E"

APPENDIX "E"

Rules of the United States Court of Appeals for the Federal Circuit.

Rule 15. Oral Argument

(a) General. FRAP 34, as supplemented by the additional provisions of this rule, shall apply to oral argument. The provisions of FRAP 34(a) respecting unanimity of the panel in dispensing with oral argument, opportunity to submit a statement supporting oral argument, and the criteria to be employed in determining whether oral argument is needed, are adopted and made part of this rule.

APPENDIX "F"

APPENDIX "F"

NOTICE TO COUNSEL

Counsel are herewith notified of the court's statement in Asberry v. United States, No. 53-81, decided November 12, 1982. (692 F.2nd 1378)

This notification neither implies nor intimates a present evaluation of your appeal. It is provided solely to enable counsel and parties to evaluate their own appeals.

In Asberry, the court stated:

> After the date of this opinion, a frivolous appeal filed or proceeded with in this court,7/ will result in imposition of damages and costs upon appellant and counsel in accordance with Rule 38 (Fed. R. App. P.).

7/ Proceeding with a frivolous appeal after filing is applicable to appeals now on file and includes the filing of a brief, or, where briefs have been filed, submission of the case with or without oral argument.

In Connell v. Sears, 722 F.2nd 1542 (1983), Beachboard v. United States, 727 F.2nd 1092 (1984), and in Wright v. United States, 728 F.2nd 1459 (1984), the Court imposed damages and awarded double costs.

By direction of the court.

May 1984

George E. Hutchinson

Clerk

NOTICE TO COUNSEL AND PETITIONERS

IN AIR TRAFFIC CONTROLLER LITIGATION

Enclosed are opinions in the Air Traffic Controller "Lead Cases".

The suspension entered by the Cou on February 24, 1983 in all other Air Traffic Controller cases will remain i effect until final disposition of all the "Lead Cases."

You will be notified upon final disposition of all "Lead Cases." With 30 days from the date of that notifica tion you must notify this court in writing if you want to prosecute your appeal. If you do not so notify the court, your appeal will be dismissed. Retained filing fees will be returned.

The court has directed attention the prosecution of frivolous appeals. Wright v. United States, 728 F.2d 1459 (1984); Beachboard v. United States, 7 F.2d 1092 (1984); Connell v. Sears, 72

F.2d 1542 (1983); and Asberry v. United States, 692 F.2d 1378 (1982).

May 18, 1984

George E. Huchinson,

Clerk

M E M O R A N D U M

TO: Counsel/Petitioners Air Traffic Controller Litigation

FROM: George E. Hutchinson, Clerk

DATE: July 12, 1985

SUBJECT: Decisions in FAA Cases

The enclosed published opinions of the Court in Air Traffic Controller cases are transmitted for your information. The Court has also applied sanctions in a number of unpublished opinions dealing with frivolous appeals. The Court has not yet evaluated your appeal(s) for frivolity. You may wish to consider whether, in the light of the enclosed, you should again make such evaluation.

Enclosures: Opinions in 83-1168 and 85-931

GEH:bam

APPENDIX "G"

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

WILLIAM S. RUSSELL*	)	DECISION NO.: SF075281F2569
v.	)	DATE: January 21, 1983
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION	)	

I. INTRODUCTION

By petition filed on September 10, 1981 with the San Francisco Regional Office of the Merit Systems Protection Board (Board) the

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* A consolidated hearing was held in Los Angeles, California beginning on November 1, 1982, for certain air traffic controllers formerly employed at the Los Angeles TRACON, Los Angeles Tower, Long Beach Tower, Hawthorne Tower and Torrance Tower. Mark E. Beck, Attorney At Law, representing appellants William S. Russell, Daniel J. Houlihan and Robert E. Henry, was present and participated in the consolidated portion of the hearing, as well as in the individual hearings. Refer to John A. Crane, SF075281F2514, Master File.

BEST AVAILABLE COPY

appellant, William S. Russell, appealed the action of the Department of Transportation, Federal Aviation Administration (FAA), Western Region, Los Angeles, California which removed appellant from the position of Air Traffic Control Specialist, GS-14/1, effective August 28, 1981. Appellant's duty station was the Los Angeles TRACON.

II. JURISDICTION

Appellant was an employee as defined by 5 U.S.C. 7511(a)(1)(A), and under the provisions of 5 U.S.C. 7512 and 5 U.S.C. 7513(d) was entitled to appeal the action to the Board, in accordance with the appellate procedures as set forth in 5 U.S.C. 7701.

III. BACKGROUND

On August 8, 1981, appellant was issued a Notice of Proposed Removal which set forth the reasons for the action as follows:

Reason 1. Violation of 5 U.S.C. 7311 which states in pertinent part, an individual may not accept or hold a position in the Government of the United States...if he...participates in a strike against the Government of

the United States...and 18 U.S.C. 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification. Beginning at approximately 7:00 AM EDT on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 1:30 PM PDT on August 3, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States Government.

Reason No. 2. Unauthorized Absence.

Specification. Beginning first at the 1330 shift on August 3, 1981, you failed to report for your scheduled tour of duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress and that you must return to duty for your regularly scheduled shift. You failed to return to duty and instead remained absent without authorization.

The notice further informed appellant that the foregoing action gave the agency reasonable cause to believe that a crime had been committed for which a sentence of imprisonment could be imposed; therefore, the appellant was granted 7 calendar days to reply to the charges personally and in writing.1/

1/ 5 U.S.C. 7513(b)(1) and (2); 5 C.F.R. 752.404.(d).

The appellant replied personally and in writing to the charges. A Notice of Final Decision was issued by the facility chief which effected the removal action. The decision letter informed the appellant of the appeal rights to the Board or through the negotiated grievance procedure.

In the petition of appeal, appellant requested a hearing. The hearing was held in Los Angeles, California, and the transcript of the hearing is a part of the appeal record.

IV. LAW, ANALYSIS, AND FINDINGS

A. General Law

In order for the agency to remove an employee for conduct-based reasons, the agency must establish three basic elements: 1) that the alleged conduct did in fact occur; 2) that the efficiency of the service required some discipline; and (3) that the particular penalty was appropriate. 5 U.S.C. 7513(a). Allen v. United States Postal Service, 2 MSPB 582 (1980); Phillips v. Bergland 582 F.2d 1007, 1010 (4th Cir. 1978).

An adverse action promotes the efficiency of the service when the grounds for the action relate to "...either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interests..." McClelland v. Andrus, 606 F.2d 1279, 1291 (D.C. Cir. 1980), quoting Do v. Hampton, 556 F.2d 272 (D.C. Cir. 1977). See also, Pezza v. Department of Health and Human Services, 3 MSPB 167 (1980). In particular, the FAA must make two separate showings with reference to the efficiency of the service. First, it must establish that there is a nexus between the sustained charges and the efficiency of the service. That is, it must establish that some penalty would be appropriate. Second, it must establish that the penalty imposed was a reasonable one. A finding that the penalty was reasonable is a finding that the adverse action promoted the efficiency of the servic Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (April 10, 1981).

The decision by the FAA to remove the appellant must be supported by a preponderance of the evidence if it is to be sustained. 5 U.S.C. 7701(c)(1)(B). This Board has defined the preponderance standard as requiring evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue. Borninkhof v. Department of Justice, MSPB Docket No. SF075209008 (February 27, 1981); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). All of my findings of fact will be in terms of this preponderance standard.

Every element of the FAA case which rests on a finding of fact must be supported by a preponderance of the evidence. Douglas, supra, at 35. See also, Bavier v. Department of Transportation, MSPB. Docket No. SE075209009 (February 10, 1981); In re Van Sciver, 1 MSPB 94 (1979).

B. Strike Participation Law

The first and most important of the two stated charges is that appellants participat-

ed in a strike against the United States Government commencing on August 3, 1981, in violation of 5 U.S.C. 7311 and 18 U.S.C. 1918.

Section 7311, Title 5, United States Code, provides in pertinent part that an individu "may not accept or hold position in the Government of the United States" if he/she participated in a strike against the Govern- ment of the United States.

Section 1918, Title 18, United States Code, makes violation of section 7311 a crime and provides for a fine of not more than $1,000 or imprisonment for not more than one year and a day, or both.

C. Proof of Conduct

The charges against the appellant were set forth in the advance notices of proposed removal.

Charge No. 1 - Participation in an Illegal Strike

The appellant was charged generally with participation in a strike against the Federa

Aviation Administration in violation of two statutory provisions cited above. Appellant was specifically charged with and removed for having participated in the strike when he failed to report for duty as scheduled. Thus, the agency has the burden of proving that there was a strike on the dates charged, that the appellant failed to report for duty as scheduled, and that he participated in the strike.

With regard to the first element, the Board's regulation at 5 C.F.R. 1201.67 provides that a presiding official may take official notice of matters of common knowledge or matters that can be verified, and that such official notice satisfies a party's burden of proof. The Board has held that such notice does not prevent a party from disputing the fact of which notice was taken. Ketchem v. Federal Aviation Administration, MSPB Docket No. DA075281F0713 (May 28, 1982), at 4, citing Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 301 (1937).

The Board discussed at length in Ketchem the propriety of officially noticing the commencement and duration of the Professional Air Traffic Controllers' Organization (PATCO) strike.

It concluded by taking official notice, subject to the right of refutation, that an unlawful strike of air traffic controllers commenced on August 3, 1981, and was still in progress on August 6, 1981. Further, it held that where an employee is charged with participation in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned on that day.

Accordingly, I hereby take official notice that the strike was in progress from August 3, 1981 through August 6, 1981. The parties were afforded the opportunity to refute the matter to be officially noticed, and have not done so. I further find that the agency has

met its burden of proving that he strike continued in progress long after August 6, 1981. The deciding official, as well as other management personnel, testified that the absenteeism rate for controllers continued at the same level as on August 3, 1981, and that the controllers who were scheduled to report after August 6, 1981 failed to report for duty.

Picketing activities at various facilities in the Los Angeles area, as well as throughout the United States, continued and were given widespread television and newspaper coverage. The agency supported its position with copies of newspaper articles and photographs depicting strike activities after August 6, 1981. The agency officials testified that the PATCO leadership maintained its posture that the strike was still in progress through official proclamations and by its taped telephone communication to its members and supporters. No evidence was presented by appellant which refuted the fact that the strike continued on

at least through August, 1981. Therefore, I find that the strike began on August 3, 1981 and was in progress at all times relevant to this appeal. 2/

Regarding the second element, appellant's participation in the strike, Board precedent provide ample guidance. The Board has held that, in a case where existence of a strike is a matter of general knowledge, the agency establishes a prima facie case that an employee voluntarily participated in the strike by presenting evidence of an employee's unauthorized absence from duty during the strike. Schapansky v. Department of Transportation, Federal Aviation Administra-

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2/ Notwithstanding my having officially noticed the strike, in his submissions appellant in no way attempted to rebut the agency's circumstantial evidence of the strike which included news media coverage of the strike; statements of PATCO officials; the fact that the employees wore buttons with slogans of the strike and otherwise spoke about the impending strike; notice from headquarters about the strike; President Reagan's announcement of August 3, 1981; and picketing activities at many FAA facilities in the Los Angeles area.

ion, MSPB Docket No. DA075281F1130, slip pinion at 6, (October 28, 1982). The burden hen shifts to the employee to rebut the gency's case by presenting evidence to show hat he had no knowledge of the existence of he strike or to demonstrate that his absence as due to some factor other than intentional articipation in the strike. Id. However, he agency retains the burden of proof to ultimately establish appellant's participa- ion by a preponderance of the evidence" ursuant to 5 U.S.C. 7701(c)(1)(B). Id., at , n. 2. The Board identified the gravamen of a charge of striking against the Govern- ment as "an employee's voluntary withholding of services in concert with others, and not his physical presence on a picket line...." Id. citing United Federation of Postal Clerks v. Blount, 325F. Supp. 879, 884 [D.D.C., aff'd, 404 U.S. 802 (1971), n. 3.]

Time and attendance reports in the record establish that appellant was scheduled to

report for duty for identified shifts in August, 1981. These reports also stated that he did not report for duty on those days, and that he was not on approved leave. Appellant's supervisor also testified that appellant was scheduled to work the cited days, that he was not present for duty, and that his absence had not been excused. The record, including the hearing presentation, reveals no contradictory evidence. I find, therefore, that appellant was absent on the cited dates without permission or excuse. In this case, appellant was charged with failure to report for his scheduled tour of duty beginning at 1:30 PM on August 3, 1981 and continuing until issuance of the Notice of Proposed Removal, dated August 8, 1981. The agency submitted copies of all pertinent records and documents relied on to support the charges, including the time and attendance records, watch schedules and the personnel logs (sign-in sheets).

The watch schedule indicates that appellant was initially scheduled for annual leave on August 2 and 3, 1981. James A. Holweger, facility chief, testified that Lloyd Golden, deputy chief, contacted appellant by telephone on the morning of August 3 and notified him that his annual leave had been canceled and that he was to report for duty at 1:30 PM on August 3, 1981. Appellant was scheduled to report for duty on shift 7 (0642-1442) on August 4, 5 and 6, 1981. Appellant did not report for any of the scheduled tours of duty. His personal deadline date was 0642 on August 6, 1981. Appellant was not on approved leave during this period of time.

Mr. Holweger testified that all controllers at the Los Angeles TRACON were fully briefed as to the illegality of the strike. The appellant had been transferred to the Los Angeles TRACON from Burbank approximately two months prior to the strike. Appellant had been briefed as to the illegality of the strike while he was at the Burbank facility.

While at the Los Angeles TRACON appellant was classified as a developmental controller; however, he was a full performance controller, GS-14, at Burbank.

Mr. Lloyd Golden testified that he had talked to appellant at 9:55 AM at August 3, 1981 and informed appellant that he was cancelling his scheduled annual leave. Appellant's response was "I think you know my position." Mr. Golden further testified that he had no recollection of another phone call from appellant, almost immediately thereafter, in which he stated that he was not reporting for duty because he was afraid to return. His only recollection of further conversation with appellant dealt with scheduling his oral reply.

Appellant submitted a 4 1/2 page typewritten reply to the charges, dated August 14, 1981, in which he stated that he was coerced and intimidated by PATCO into not reporting for duty. He explained that he was a developmental controller at the Los Angeles TRACON and was

remely worried about his future career and
tification. He claimed that he could not
ain the necessary training and certifica-
n unless he fully supported PATCO and the
ike. He was forced to join PATCO in
ember of 1980, paying a $500 initiation
, because he was informed by PATCO members
t he would never progress in his career
hout their support. He was aware of other
trollers who had been harassed and threa-
ed by PATCO and he believed that PATCO
ld fulfill their threats.

pellant explained that he had been under
vere emotional distress in the past due to
rking conditions and job pressures which
d also adversely affected his personal and
mily life. He stated that in the past he
d received professional psychiatric treat-
nt from Dr. William J. Baumann.

pellant stated that he was caught in the
lemma of being fired by the agency if he
nt on strike with PATCO or not becoming
rtified if he did not support PATCO.

Mr. Donald L. Meir, Evaluation and Developmental Specialist, Los Angeles TRACON, testified that he was the training officer for developmental controllers at the facility. He knew the appellant as well as other developmental controllers, and he was aware of the peer pressure that they faced in becoming certified. All of the on-the-job training instructors were members of PATCO and were in the position to exert pressure on non-members or non- supporters of PATCO. He believed that all of the developmental controllers were aware of this and this had a great deal of influence upon them. He acknowledged that all of the controllers had a difficult choice to make, whether to go on strike with PATCO, or to remain on duty in support of the agency.

Mr. Golden further testified that during the oral reply to the charges, appellant read a prepared reply, which is also a part of the record. Mr. Golden stated that he asked a few questions for clarification and made his

mary of the oral reply. Appellant told
that any threats were of a general nature
n no specific threats made to him person-
y. He would not name any specific indi-
uals involved in any of the threats, but
ked about the general atmosphere and
ors. Appellant also admitted that he had
keted once during the strike.

appellant did not testify during the
ring. His attorney stated the appellant's
sons for not returning to duty as scheduled
these were because he was coerced and
assed by PATCO.

William J. Baumann, Physician and Surgeon,
board-certified Psychiatrist, testified
length during the hearing on behalf of the
pellant. He stated that he first met the
pellant in consultation on May 18, 1980 and
nce that time, appellant had three distinct
d separate periods of treatment. The first
riod was in May 1980, when he saw appellant
cause of personal family relationships.
cond, was on February 3, 1981, which was

work related, and appellant was in a state of anxiety. This situation was a result of an airplane crash in which two people were killed while appellant was on controller duties. A third period was between May 20 and June 20, 1981. This was also work related and dealt with the anxiety appellant was experiencing due to job pressures and the talk of a possible controllers' strike. Appellant was in training on the new position and he was fearful as to his future in his long-term relationship as an air traffic controller.

Dr. Baumann stated that he also talked to appellant several times on the telephone between June 20, 1981 and the beginning of the controllers' strike in August, 1981. It was his professional opinion that appellant was fearful of what was happening to him and he did not know what to do. The pressures on the job presented him with a decision which he was unable to make. Dr. Baumann stated that he thought appellant was ill and he

vised him that if he wished, he would have
m placed in a hospital. This was based
lely on his telephone conversations with
pellant and he did not see him in his
fice. It was Dr. Baumann's opinion that
e telephone calls to him were made out of
xiety on the part of the appellant who was
sking for assistance in reaching a decision.
e could not tell appellant what his decision
ould be.

r. Baumann testified that the appellant
ever mentioned any fear from physical or
ersonal harm. He stated appellant could not
ake up his mind and he was suffering from
sychological stress.

here the defense of coercion has been raised
y an appellant, the Board has held that:

n order for a Federal employee charged with
articipation in a strike against the govern-
ent to establish a defense of coercion or
uress, he must demonstrate, by a preponder-
nce of the evidence, 19/ that his failure to
eport for work was the result of a threat or
ther intimidating conduct, directed toward
im, sufficient to instill in him a reason-
ble fear of physical danger to himself or
thers, which a person of ordinary firmness

would not be expected to resist. (remaining footnotes not reproduced) Johnson v. Department of Transportation, Federal Aviation Administration, MSPB Docket No. DC075281F0998 (November 10, 1982), at 11-12. 3/

In the instant case, I find that the evidence of threats and intimidation provided by appellant do not meet the standard for establishing coercion in Johnson, supra. According to the appellant, all of these threats caused him to suffer severe mental

3/ As authority for the preponderance of the evidence standard in the above-quoted text, Johnson, supra, in note 19, cites 5 C.F.R. 1201.56(b) and 5 U.S.C. 7701(c)(2)(C). These sections are concerned with affirmative defenses, thereby suggesting that a showing of coercion could be regarded as an affirmative defense. However, elsewhere in the Johnson decision, and in other Board decisions, a showing of coercion was considered as a rebuttal to the agency's prima facie case of voluntary participation in a strike. See, e.g., Duckett and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (February 19, 1982) and Jones v. Tennessee Valley Authority, MSPB Docket AT07528010300 (February 19, 1982). Consequently, in the instant case, I am giving consideration to the claim of coercion in order to determine whether appellant has rebutted the agency's prima facie case of voluntary participation in the strike.

ress and anxiety and convinced him that it uld be unsafe for him to report for duty. vertheless, these actions constitute the pe of "overheard statements, menacing tones, d generalized threats, directed toward or lated to all potential non-strikers" which e Board ruled not sufficient to rebut the ency's prima facie case of striking. John- n, supra, p. 11. The Board also stated, hnson, supra, pp. 8-9, that jeopardy to reer advancement and other allegations sulting in a state of mental perturbation, not render alleged strike participation voluntary. The Board specifically included eopardy to career advancement," "threats of ture air traffic control systems errors rced on non-striking controllers by their riking co-workers after the end of the rike and the resumption of normal opera- ons." Johnson, supra, p. 9, note 13. cordingly, I find that the type of threats d reprisal action described by the appel- ant does not meet the standards defined

by the Board to establish a defense of coercion or duress, by a preponderance of the evidence, as set forth in Johnson, supra, "sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person or ordinary firmness would not be expected to resist."

Lastly, the agency has established that appellant was personally advised of consequences resultant from striking against the federal government. The FAA had directed all Tower Chiefs to specifically inform each Air Traffic Controller of the illegality of a strike, as set forth in the May 29, 1981 letter by J. Lynn Helms, FAA Administrator. The Tower Chief testified that this directive was carried out during the month of June, 1981, that each Controller was so informed, and that he or his subordinate had documented this warning.

In summary, the preponderance of the evidence established the following. Before the strike in issue, appellant was advised of its

unlawful character; there was a strike against the government for the relevant time period; appellant was scheduled to work, he failed to appear for duty; and he had neither permission nor excuse to absent himself. Based on the above evidence, I find that the appellant has not rebutted the agency's prima facie showing that he participated in a strike. Accordingly, I find that the agency has proved by a preponderance of the evidence that the appellant participated in an illegal strike against the Federal Government on the dates charged.

The agency's first charge is therefore sustained.

Charge No. 2

The agency's second charge is that appellant failed to report for his scheduled tour of duty and remained absent without authorization (AWOL) during the same period for which he is charged with being on strike. All elements of this charge have been thoroughly discussed above and will not be repeated

here. I find that based upon appellant's admission, the testimony at the hearing, and the agency's attendance records, appellant did fail to report for duty and that his absence was without authorization. The charge is sustained.

Unauthorized absence from duty also disrupts the efficiency of the service and warrants disciplinary action including removal. Desiderio v. Department of the Navy, 4 MSPB 171 (1980).

Discipline is therefore warranted.

2. Reasonableness of the Penalty

The purpose of Board review of the penalty selected is "to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness." Douglas, supra, at 28. When the Board does find that a penalty is excessive, the corrected penalty to be specified by the Board is not the penalty which the Board itself would find to be reasonable, but instead is the maximum penalty that would be "within the parameters

reasonableness". Davis v. Department of
nsportation, Docket No. NY075209075
ctober 2, 1981).

e reasonableness of the penalty of removal
re must be evaluated in light of the
eviously cited statute, 5 U.S.C. 7311,
ich prohibits a person from holding a
sition in the Government if he participates
a strike against the Government. Since
e language of the statute is plain, it
ntrols unless there is a "clearly expressed
gislative intention to the contrary."
nsumer Product Safety Commission v. GTE
lvania, Inc., 447 U.S. 102 (1980), or
less it would lead to "absurd results."
ommission v. Brown, 380 U.S. 563, 571
1965). 4/

4/ The legislative history of 5 U.S.C. 7311, Pub. L. No. 84-330 (1955), and Section 305 of the Taft-Hartley Act, supports an inference that Congress intended to require the discharge of persons who strike against the Government. Further, Section 7311 is wholly consistent with other laws on this subject (Section 3333) and 18 U.S.C. (1918), and would not, therefore, lead to absurd results.

In Schapansky, supra, the Board noted that 5 U.S.C. 7311 could be read to require removal as a mandatory penalty for striking against the Federal Government. After noting that this position had been taken by at least one federal circuit court, the Board held that it was not necessary to decide as a matter of law whether such a penalty was required in a similar case of an air traffic controller found to have been on strike and unauthorized absence from August 3 to August 6, 1981. 5/ It held, as I do here, that no satisfactory basis for mitigation exists in the case. The gravity of the offense is patent. Section 5 U.S.C. 7311, reflects the considered belief of Congress that discharge for participation in a strike against the Federal Government warrants removal. Such conduct is a criminal offense for which imprisonment may be imposed 18 U.S.C. 1918. The position of Air Traffic

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5/ American Postal Workers v. U.S. Postal Service, 682 F.2d 1280, 1285 (9th Cir. 1982)

ntroller is a highly sensitive one, as
ted by the Board, since a controller is
rectly responsible for the safety of
rline passengers and must preserve the
nfidence of the employer and the general
blic. Borsari v. Federal Aviation Adminis-
ation, MSPB Docket No. NY0752209163, at 5-7
une 24, 1982). The controller's intentional
rticipation in a strike and failure to
rform his duty is particularly egregious
nduct which destroys the relationship of
ust between employer and employee. Schapansky,
pra.

nally, appellant signed an affidavit upon
s appointment to the agency that he would
ot strike against the Government. By
triking, he violated that oath, thus under-
ining the agency's confidence in appellant's
ntegrity and ability to perform his assigned
uties.

find that under Douglas, supra, the agency
mposed penalty is not clearly excessive or
isproportionate to the sustained charge of

striking against the agency. The penalty is reasonable and the removal action promotes the efficiency of the service. Johnson, supra at 16.

V. AFFIRMATIVE DEFENSES

Even though the agency has met its burden of proof, appellant's removal may not be sustained if appellant shows harmful error in the application of the agency's procedures in arriving at such decision, shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b), 6/ or shows that the decision was not in accordance with law. The appellant has the burden of proof in establishing these affirmative defenses. 7/

Pay Status During the Notice Period.

The appellant specifically raised the issue in his appeal to the Board that the agency

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6/ 5 U.S.C. 7701(c)(2)(A)-(B)

7/ 5 C.F.R. 1201.56(b)(1)-(2). Martinez v. Department of Defense, 4 MSPB 109 (1980).

lled to place him in a duty and pay status, in a nonduty with pay status, during the vance notice period, in accordance with 5 .R. §752.404(d)(1). He claimed that on gust 18, 1981, he had clearly notified his cility chief that he was ready, willing and le to return to duty. Nevertheless, the cility chief refused to allow him to return duty and maintained him in a nonduty and npay status during the remainder of the tice period.

tle 5 U.S.C. §7513 (b)(1) provides for the ortened notice period of not less than ven (7) days where the crime provision has en properly invoked, as it has been in this se. The implementing regulations, 5 C.F.R. 52.404 (d)(1), provide that when the cir- mstances require immediate action, the ency may place the employee in a nonduty atus with pay for such time not to exceed days, as is necessary to effect the tion.

When the agency issued the notice of proposed removal, the appellant was in an AWOL status as the result of his failure to report for his regularly scheduled tour of duty, as previously discussed. The testimony and evidence of record reveal that the agency, through its facility chief, would not allow any striking controller to return to a duty status after he had missed his individual deadline date. The appellant was maintained in a nonduty and nonpay status during the notice period until the effective date of his removal. The appellant contends that this was a procedural error and not in conformance with the adverse action regulations. He claims that he should have been placed in an active duty pay status because after receiving the proposed removal notice, he had personally contacted his facility chief and informed him of his desire to return to active duty. At that point, appellant was ready, willing, and able to return to duty, but he was not allowed to do so.

major Board decision on this issue is
is v. Tennessee Valley Authority, MSPB
ket No. AT07528110206 (May 10, 1982), in
ch it was held that here the agency had
sonable cause to believe the appellant
ered and passed a forged instrument, the
ellant was entitled to a "reasonable time
not less than seven (7) days..." during
ch time he was entitled to be retained in
ay status.
clear implication of the Board's decision
that during the notice period of a removal
tion or a suspension based on the "crime
ovision", employees are to be retained in a
status. See also, Johnson v. Department
the Treasury, MSPB Docket Nos. DC07522092213/4
ugust 24, 1982); and Ratley v. Department
the Army, MSPB Docket No. AT07528110338
eptember 17, 1982).
parently this was also the position of the
ency as expressed in GENOT 128, page 3,
ra. 4, which specifically states, "Control-
rs who appear for duty after the appropriate

deadline has passed shall be placed in a non-duty status NTE 10 calendar days." (Emphasis added.)

I find that the appellant should have been placed in a pay status after he notified his facility chief that he was now ready, willing and able to return to duty. The agency had the option to place the Appellant in a duty status, or in a nonduty paid status, for a period not to exceed 10 days. However, as previously discussed, I find that the failure on the part of the agency to comply with the above-cited statute an regulation does not constitute a fatal procedural defect or harmful error because the error can be corrected. Accordingly, I direct the agency to retroactively place appellant in a pay status for that period of time during the notice period when he should have been on a nonduty paid status, until the effective date of the removal action.

VI. CONCLUSION

Having found that the charges against appellant are supported by a preponder- of the evidence, that removal was a onable penalty, and that the appellant not successfully presented any affirma- defenses, I find that the removal action be sustained.

VII. DECISION

action of the FAA in removing the appel- from his position of Air Traffic Control cialist is sustained.

s decision is an initial decision and will ome a final decision of the Merit Systems tection Board on February 26, 1983 unless etition for review is filed with the Board hin thirty-five (35) calendar days of uance of this decision.

party to this appeal, the Director of the ice of Personnel Management and the cial Counsel may file a petition for iew of this initial decision with the it Systems Protection Board. The petition

shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. An information copy of the petition should be filed with the Presiding Official at the San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of the Office of Personnel Management may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation

under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(B)(1) 8/ the Appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W. Washington, D.C. 20005 not later than thirty (30) days after the Appellant's receipt of the Board's final order or decision.

FOR THE BOARD:

THOMAS J. MANGAN
PRESIDING OFFICIAL

As modified by Section 17 of the Federal Courts Improvement of 1982 to be codified at 28 U.S.C. Section 1259(a)(9).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

RONALD E. OSWILL HOWARD W. SMITH WILLIAM M. HETHERINGTON, v. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION	DOCKET NUMBERS SF075281F2169 SF075281F2159 SF075281F2708 DATE: JANUARY 19, 1983

INTRODUCTION

By petitions filed in September, 1981, appellants appealed the action of the Department of Transportation, Federal Aviation Administration (FAA), which removed them from their positions of Air Traffic Control (ATC) Specialists effective on various dates in August, 1981. Appellants had been employed at Burbank (Oswill and Smith) and Van Nuys, California.

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JURISDICTION

An employee may appeal to the Merit Systems Protection Board from any action which is made appealable to the Board under any law, rule, or regulation. 5 U.S.C. §7701(a). An employee in the Federal competitive service may appeal an action removing him or her from the Federal service. 5 U.S.C. §§7511(a)(1)(A), 7512(1) and 7513(d). Since the appellants were employees in the competitive service who were not serving probationary periods, their appeals come within the appellate jurisdiction of the Board.

BACKGROUND

In the spring and summer of 1981, the agency and the union which represented air traffic controllers, the Profes-

tion (PATCO), were unable to reach an agreement on a new labor contract. Negotiations between the agency and PATCO continued until August 2, 1981. On that day, the PATCO membership rejected the agency's latest contract offer, and beginning August 3, 1981, thousands of air traffic controllers failed to report for their scheduled work shifts.

On August 3, 1981, at approximately 11:00 a.m. (E.D.T.), President Reaga announced that the union representin the air traffic controllers had call strike, and the President then annou that air traffic controllers had 48 hours to return to work or failing so they would have forfeited their The agency implemented the Presiden 48 hour deadline period by allowing absent air traffic controllers to r their employment if they reported f

their first scheduled shift on or after 8:00 a.m. (P.D.T.) on August 5, 1981. 1/ For those air traffic controllers who failed to report for work within the time limit, the agency issued notices of proposed removal for being absent without authorization (AWOL) and for participating in a strike. In these notices, the absent air traffic controllers, including appellants, were informed that beginning August 3, 1981, at 7:00 a.m. (E.D.T.), a nationwide strike of air traffic controllers occurred and thereafter, on specified dates, they had failed to report for duty until the "present." These air traffic controllers were therein charged with (1) participating in a strike against the U.S. Government in violation of 5 U.S.C. Section 7311 and 18 U.S.C.

1/ See, PATCO v. United States Department of Transportation, 529 F. Supp. 614 (D. Minn. 1982).

Section 1918, 2/ and (2) being AWOL. Th
proposal notices further informed
appellants that because there was
reasonable cause to believe that they
had committed a crime for which a
sentence of imprisonment could be
imposed, they would have 7 calendar da
to reply personally and/or in writing,
to the proposal notice. 3/

2/ Title 5, U.S.C. Section 7311(3) provides that an individual may not ho a position in the Government of the United States if he participates in a strike against the Government of the United States. Title 18, U.S.C. Sect 1918 provides for criminal penalties, including imprisonment, for a violati of 5 U.S.C. Section 7311.

3/ Title 5 U.S.C. Section 7513 pro- vides, in pertinent part, that:

> (b) an employee against whom an action (such as removal) is pro- posed is entitled to -
>
> > (1) at least 30 days' writt notice unless there is rea able cause to believe the employee has committed a c for which a sentence of imprisonment may be impose
> >
> > . . .

(footnote continued on following pag

Appellant Smith submitted no reply; written and oral responses were made by Oswill and Heatherington. After consideration of the replies the agency issued final decisions. In each case, the charges were found sustained and the removals proceeded.

APPELLATE BACKGROUND

On appeal, the three cases were consolidated on the basis of common representation; Mr. Mark Beck, attorney at law, represents the three appellants. Hearings on these appeals were conducted in November, 1982. The record on appeal consists of the Appeal Files (AF), the transcript of the hearings (TR), and

(footnote 3 continued)

> (2) a reasonable time but not less than 7 days to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer.

various prehearing, hearing, and post hearing exhibits (Ex.)

APPLICABLE LAW

General

In order to sustain an adverse action the agency must prove (1) that the employee misconduct charged actually occurred, and (2) that the disciplin action taken in response promoted th efficiency of the service. 5 U.S.C. 7513(a). See, Allen v. U.S. Postal Service, 2 MSPB 582 (1980) and Phill v. Bergland, 586 F.2d 1007, 1010 (4t Cir. 1978).

An adverse action promotes the effi ciency of the service when the grou for the action relate to either the employee's ability to perform his/h duties, the agency's ability to ac-

complish its mission, or some other legitimate Government interest. 5 C.F.R. 731.202(a) (1982). See, Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1977); Bonet v. U.S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981); and Pezza v. Department of Health and Human Services, 3 MPSB 167 (1980). The "efficiency of the service" requirement involves both a determination that some disciplinary action is warranted (the "nexus" requirement) and that the particular penalty is reasonable. Douglas v. Veterans Administration, MSPB Docket No. AT075299006, slip op. at 28-29 (April 10, 1981).

Thus, three distinct elements must be shown in any conduct based adverse action: 1) that the employee conduct alleged, in fact occurred, 2) that there was a nexus between the conduct and the efficiency of the service, and 3) that

the penalty imposed was reasonable. Douglas, id.

The Board may affirm an adverse action only if it is supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B). The preponderance standard requires evidence which a reasonable person would accept as sufficient to find a disputed fact mo probably true than untrue. 5 C.F.R. §1201.56(c)(2) (1982). See, Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). The agency must establish eve material element of its case by a preponderance of the evidence. In re Sciver, 1 MSPB 94 (1979); Bavier v. Department of Transportation, MSPB Docket No. SE075209009 (February 10, 1981).

Strike Participation Issues

The first and most significant of the two stated charges is that appellants participated in a strike against the United States Government commencing on August 3, 1981, in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918.

Section 7311, Title 5, United States Code, provides in pertinent part that an individual "may not accept or hold a position in the Government of the United States" if he/she participates in a strike against the Government of the United States.

Section 1918, Title 18, United States Code, makes violation of Section 7311 a crime and provides for a fine of not

more than $1,000 or imprisonment for not more than a year and a day, or both. 4/

In United Federation of Postal Clerks v. Blount, 328 F.Supp. 879 (D.D.C.) (per curiam), aff'd mem., 404 U.S. 802 (1971), a three-judge court upheld the constitutionality of these two statutes. It held that the term "strike" was a term of common usage and general understanding and cited the definition found in section 501(2) of the Taft-Hartley Act which is, "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." 5/ Blount, at 884. In order to save the statutes from any

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4/ See, also, 5 U.S.C. 3333 which requires all federal employees to take an oath not to violate Section 7311.

5/ 29 U.S.C. 142(2) 1976.

constitutional infirmity, the court interpreted "participation" in a strike to mean ". . . an actual refusal in concert with others to provide services to one's employer." Id. Since numerous reviewing bodies,6/ including the Board,7/ have adopted these definitions, they will be applied in this case. Thus, in order to establish the strike participation charge, the agency must prove by a preponderance of the evidence that (1) a strike occurred, and (2) appellants actually refused to provide their services (3) in concert with others.

With regard to the first element of the

6/ See, e.g., Tennessee Valley Authority v. Bailey, 495 F. Supp. 711, 712 (E.D. Tenn. 1980) and United States v. Haggerty, 528 F.Supp. 1286, 1291 (D.Colo. 1981).

7/ See, Ketchem, supra, at 4, n. 8, and Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130, slip op. at 5, n. 3 (October 28, 1982).

agency's case, the occurrence of a strike, the Board's regulation at 5 C.F.R. §1201.67 provides that a presiding official may take official notice of matters of common knowledge or matters that can be verified, and that such official notice satisfies a party's burden of proof. The Board has held that such notice does not prevent a party from disputing the fact of which notice was taken. Ketchem v. Federal Aviation Administration, MSPB Docket No. DA075281F0713, slip op. at 4 (May 28, 1982), citing Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 301 (1937).

The Board discussed at length in Ketchem the propriety of officially noticing the commencement and duration of the Professional Air Traffic Controllers' Organization (PATCO) strike. It concluded by taking official notice, subject to the

right of reputation, that an unlawful strike of Air Traffic Controllers commenced on August 3, 1981, and was still in progress on August 6, 1981.

In this case, appellants were advised that in accordance with Ketchem, official notice would be taken of the strike; the appellants were provided an opportunity to refute the matter to be noticed. Although appellants submitted an objection to the proposed notice, the matter to be noticed was not refuted. Hence, I hereby take official notice that a strike by air traffic controllers commenced on August 3, 1981, and continued through August 6, 1981. Each appellant was charged with striking on days between August 3 and 6; therefore, at all times pertinent to this appeal a strike was in progress.

Regarding the second element, appel-

lants' participation in the strike, the Board has held that the agency established a prima facie case that an employee voluntarily participated in a strike by presenting evidence of unauthorized absence from duty during a strike. Schapansky v. Department of Transportation, Federal Aviation Administration, MSPB Docket No. DA075281F1130, slip op. at 6, (October 24, 1982).

Time and attendance reports in the record establish that appellants were scheduled to report for duty for various identified shifts in August, 1981. These reports also indicate that appellants did not report for duty, and that they were not on approved leave.

In addition, in each individual case, the tower chief testified that appellant was scheduled for duty and that the appellant did not appear for duty and

that the absence was unauthorized. TR, Oswill, p. 35; TR, Smith, pp. 9-10; TR, Hetherington, pp. 47-49.

I note, further, that none of the three appellants has indicated on appeal that he was not absent as charged.

The evidence presented by the agency is uncontradicted; I find, therefore, that appellants were absent as charged. Thus, the evidence of record supports a finding that appellants absented themselves from work without authorization during a nationwide strike.

Regarding the quantum of proof required to establish participation in a strike, the Board precedents provide ample guidance. In Schapansky, supra, the Board held that in a case where the existence of a strike is a matter of general knowledge, the agency may establish a

prima facie case of an employee's voluntary participation therein by presenting evidence of his un- authorized absence from duty during the strike. The Board indicated that once a prima facie case has been established, the burden of going forward with evidence then shifts to appellant; however, the agency retains the burden of proof to "ultimately establish appellant's participation by a preponderance of the evidence" pursuant to 5 U.S.C. §7701(c)-(1)(B). Id., at 6, n. 2.

The Board identified the gravamen of a charge of striking against the government as "an employee's voluntary withholding of services in concert with others..." Id., at 6, citing United Federation of Postal Clerks v. Blount, 325 F.Supp. 879, 884 (D.D.C.), aff'd 40 U.S. 802 (1971).

A prima facie case has clearly been established regarding the appellants in these cases.

With regard to the term "in concert" it seems apparent that the term does not necessarily require simultaneous or contemporaneous conduct. While the term has never been defined or explained in the Blount context, standard definitions seem to focus more on a plan or agreement rather than the acting out thereof. 8/ I believe the "in concert" determina-

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8/ For instance, in Stone v. Wingo, 416 F.2d 857, 860 (6th Cir. 1969), where the issue was whether state law enforcement officials were acting "in concert" with a private investigator (thus bringing into dispute the validity of a search in an arson case) the Court stated:

> Appellant claims that Mr. Kennedy was acting in concert with the state officials, and was not acting solely on his own initiative as a private investigator for the insurance company.

(footnote continued on following page)

(Footnote 8 continued)

"Concerted" means: 'Mutually contrived or planned; agreed on; (Webster's International Dictionary, 2nd Ed.)'" United States v. Insurance Board of Cleveland, D.C., 188 F.Supp. 949, 956. In 15A C.J.S. 325, "Concerted action" is defined as: "Action which has been planned, arranged, adjusted, agreed upon, and settled between parties acting together, in pursuance of some scheme," and quoted in Rock Creek Oil Corporation v. Moore, Tex. Civ. App., 41 S.W. 2d 501, 504, from 12 C.J. 385.

It is unclear to what extent cases decided under the National Labor Relations Act might be applicable. Section 7 of the Act protects the right of private sector employees to engage in "concerted activities for the purpose of. . . mutual aid and protection . . .". 29 U.S.C. §157. That language is a term of art applied to determine whether employees' conduct is protected under the Act. However, these cases, if applicable, do seem to generally support the interpretation of "in concert" here espoused. See, for instance, Anchortank, Inc. v. NLRB, 618 F.2d 1153, 160 (5th Cir. 1980) where it was stated:

> The mere fact that an employee has acted alone does not preclude treatment of his action as concerted activity for mutual aid or protection under section 7. [cites omitted] . . the determination whether a single employee's action is protected by section 7 turns on the "interpretation of the purpose and effect of such action and not upon the simple and more limited question of whether there was, in fact, action 'in concert.'" [cite omitted]

tion is a question of fact in each individual case looking not only at the conduct involved but such factors as whether there is an explicit agreement or implied understanding guiding individual conduct, whether individual actions are a part of the same transaction are intended to be mutually supportive, whether the actions have as their purpose a group goal, and the like. Thus, the "actual refusal" of one employee to provide his/her services on a particular day does not necessarily have to occur at precisely the same time another employee refuses if both refusals arise out of a pre-existent agreement, are part of the same transaction, are intended to be mutually supportive, and/or are directed toward a common goal.

Thus, "concerted action" is action that has been planned, arranged, adjusted,

agreed on and settled between parties acting together pursuant to some design or scheme. The agreement to withhold services and the actual withholding of services was the concerted activity. I find that when an appellant withheld services at a time when the strike was in progress, pursuant to the plan of his labor organization, he was in concert with all other controllers who made the same decision. Because of the differences in work schedules, controllers could not and did not withhold their services at the same time in all cases. Rather individual controllers participated in the strike by withholding services during his or her scheduled shift.

The above definition of "in concert"

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subsumes any intent 9/ requirement regarding striking.

9/ Intent is a state of mind which generally must be proven by circumstantial evidence. It is an implicit element of many charges, especially those which are criminal in nature. See, Messersmith v. General Services Administration, MSPB Docket No. DC07528010253, slip op. at 8-9 (December 2, 1981), Franklin v. Navy, MSPB Docket No. SF07528090082, slip op. at 2, n. 1 (February 3, 1982), and Dobroski v. Department of Justice, MSPB Docket No. SF07528010278, slip op. at 3 (July 20, 1982) all involving theft offenses and Filson v. Department of Transportation, MSPB Docket No. AT075209304, slip op. at 9 (July 14, 1981) and Farguson v. Army, MSPB Docket No. DA07528010324 (March 22, 1982) involving fraud offenses. It appears that participation in a strike, which is a criminal offense under 18 U.S.C. §1918, also requires a showing of intent. See, Jones v. Tennessee Valley Authority, MSPB Docket No. AT07528010300 (February 19, 1982), and Duckett v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (February 19, 1982), where the Board found the agency's prima facie case was overcome by appellants' showing that their failure to appear at work and their presence on the picket line was the result of fear of physical injury. See, also, Schapansky, supra, at 5 (presiding official found incredible appellant's contention he "did not intend to participate in the strike") and United States v. Martinez, ___ F.2d ___ (9th Cir., September 24, 1982) (government's proof in a contempt proceeding left open the possibility

(footnote continued on following page)

As previously noted, appellants were absent without authorization during a nationwide strike. To argue that appellants' unexplained absences from their scheduled shifts in August, 1981, were not in concert "beggars credulity" giv the facts that the controllers' union PATCO - had announced a strike, 70 percent of the nation's controllers walked off their jobs, and where, at t facilities involved in these cases, th overwhelming majority of controllers failed to report for their shifts. Fo & Plastics Division, Tenneco Chemical v. General Drivers, and Helpers, Loca Union 401, Teamsters, 550 F.2d 945, 9

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(footnote 9 continued)

that appellants quit their job "witho any intent to participate in the strike.") (Slip Opinion, at 4808).

(3rd Cir. 1975. 10/

In rebuttal to the prima facie case established by the agency, each appellant alleged that he was coerced into not reporting for duty. With regard to the defense 11/ of coercion, the Board has recently ruled that:

10/ In the Foam case, the court found a violation of a no-strike clause in the collective bargaining agreement based on the fact that 90% of union member workers called in sick on one particular shift.

> Local 401 maintains that the work stoppage was purely coincidental and a case of what could be called spontaneous combustion upon the "sick" drivers. This beggars credulity.

The same reasoning applies to the facts in this case.

11/ Board decisions reveal a conflict as to how a claim of duress/coercion should be treated. For the reasons to be set forth, I regard this claim as a simple defense to the charges and not as an affirmative defense. See Trick v. Federation Aviation Administration, MSPB Docket No. DC075 2811F1144 (Dec. 17, 1981); Duckett and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (Feb. 19,
(footnote continued on following page)

...[t]he appropriate standard for establishing a defense of coercion or duress requires the employee to demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical dange

(Footnote 11 continued)

1982); and Jones v. Tennessee Valley Authority, MSPB Docket No. AT07528010 (Feb. 19, 1982). Footnote 19 in Johns infra, at 11 raises a question as to whether such a claim may be an affirm ative defense. It addressed the stand of evidence (preponderance); however, CFR 1201.56(b) (affirmative defense) 5 USC 7701(c)(2)(C) (not in accordanc with law) were cited, thus suggesting defense of this type, coercion, was n a defense to a basic element of the charge. It is axiomatic that a charge voluntary misconduct (striking) may n be sustained if coercion or duress is established. Thus, the matter is here treated as a defense to the charge ar not as an affirmative defense. In eit case, however, the result in this cas would be unaffected.

to himself or others, which a person of ordinary firmness would not be expected to resist. Johnson v. Federal Aviation Administration, MSPB Docket No. DC075281F0998 slip op. at 4 (November 10, 1982). In establishing the above standard, the Board rejected both the generally accepted standard for duress involving criminal activity and the liberal civil standard. The Board did not accept the agency argument that the criminal standard was appropriate because under 5 U.S.C. Section 7701(c)(1)(B), the agency must support it charges against an appellant by a preponderance of the evidence. Therefore, the imposition of a strict criminal standard of proof would be inappropriate and inequitable. The liberal civil standard was not accepted by the Board on the theory that a Federal employee's participation in a strike against the Government is such a serious

offense and charge that a stricter standard should be applied under the circumstances. Therefore, the Board concluded:

> [t]hat a standard for determining duress stricter than that generally applied to civil cases is required of a Federal employee attempting to refute a charge of participation in a strike against the Government.

Id. at 8. The application of this standard has led the Board to decide that overheard statements, menacing tones, and generalized threats, directed toward or related to all potential non-strikers and heard or observed by an appellant are not sufficient to rebut the agency's prima facie case of striking.

Consistent with the Board's ruling in Johnson, supra, the test for determining

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the existence of duress is an objective one based upon an assessment of the actions of a reasonable person under like circumstances. Id. at 12. Therefore, although individual circumstances are to be considered, resolution of the issue of duress or coercion depends upon an application of the facts to a reasonable person standard. Personal and professional pressure on an appellant will not support a finding of coercion. Id. at 14. Similarly, threats of perceived jeopardy to career advancement, as well as threats of prospective denial of assistance and/or training do not rise to the level of duress or coercion. Id. at 9. Moral exhortations, overheard statements, and generalized threats are insufficient foundations for a finding of duress. Id. at 15.

The concerns expressed in support of appellants' claims do not rise above the

overheard generalized threats referred to in Johnson. It is apparent in these cases that the real fear experienced by appellants concerned the risk they would be taking if they withheld their services. Appellants were fully aware that striking was illegal (each had been briefed in June) and they chose to participate; appellants placed their jobs on the line. The fact that that decision may have been grossly wrong does not equal coercion.

Evidence and argument submitted for each appellant individually will be discussed next.

Appellant Ronald Oswill

Appellant Oswill was removed for striking on August 6, 1981.

Evidence of record reveals that appel-

lant Oswill reported to the facility on August 3 and 4, 1981. On August 5, 1981, appellant called in and requested sick leave.

Appellant's first contention is that he was not scheduled for duty on August 6. For the reasons to be set forth, I find this contention to be totally without merit; I find, further, that this contention and appellant's testimony raise serious questions concerning appellant's credibility.

Undisputed evidence of record reveals that following the commencement of the strike it became necessary to revise the posted work schedule at Burbank Tower. The tower chief testified that because so many people were absent, a new schedule was devised utilizing the people who remained.

/ / /

As previously indicated, appellant reported for duty on August 3 and 4. However, on those two days appellant was disqualified from performing air traffic control duties because of medication he was taking. Because of that situation, appellant was assigned no shifts on the revised schedule. On those days, he worked his previously scheduled regular shifts. That regular shift included a midnight shift (12:01 a.m.) August 6.

On appeal, appellant contends that he had swapped a shift on one of his days off before his five day week began and he was of the belief that he was off on his regular fifth day of duty.

The tower chief testified that there was no doubt that appellant knew full well what his shift was. TR, Oswill, p. 76; see also, TR., pp. 37-45. Review of the evidence reveals that appellant's

argument is specious.

Appellant had been an air traffic controller for 12 years. It is simply unbelievable that appellant was not familiar with work weeks. Appellant would have the Board believe that he believed that whenever one works five days, the next days are off. Under all of the circumstances, appellant's specious contention negatively impacts his credibility.

Appellant also contends that he was coerced. In his testimony appellant indicated that when he did not support a proposed strike in June of 1981 he had been the recipient of ostracism -- "cold shoulder", "no socializing", "verbal abuse". TR, Oswill, p. 119. Appellant testified that he had received threatening telephone calls, as had his wife. None of these allegations, however, are

within the parameters of Johnson.

If appellant seriously wanted to report to work, he could have. By appellant's own admission, a controller who had been subjected to "severe harassment" reported to work (Mr. Bill Knight). TR, Oswill, pp. 136-137. Appellant's evidence is, simply, wanting. Appellant, for instance, offered evidence that a mail box had been thrown through a neighbor's window. Appellant urged that since the house looked like his, it must have been PATCO and they must have been trying to harass him -- the house, of course, was across the street from appellant's, and not even directly across, but one house down. There is no a scintilla of evidence indicating any involvement whatsoever by PATCO.

Appellant also indicated in his reply t the proposal notice that he deliberatel

took medication on August 3 and 4 so that he would not be able to perform as an air traffic controller. In this regard, I would note that one who refuses to report to work as a matter of principle to support other striking employees is himself a strike participant. See, Jones v. Tennessee Valley Authority, at 5, citing National Labor Relations Board v. Union Carbide Corp., 440 F.2d 54 (4th Cir.), cert. denied, 404 U.S. 826 (1971) and Plain Dealer Publishing Co. v. Cleveland Typo graphical Union, 520 F.2d 1220, 1223 (6th Cir. 1975), cert. denied 428 U.S. 909 (1978).

It is also a matter of record that appellant engaged in strike related activities on August 5 (the day he called to request sick leave). TR, Oswill, 142-143, 153. There are also photographs in the record of appellant

engaging in picketing activity.

In review, it is apparent, as pointed out by the deciding official, that the tower chief, Mr. Dean Cooper, bent over backwards to help appellant. Mr. Cooper arranged rides for appellant to come to work on August 3 and 4. Mr. Cooper, according to appellant, allowed appellant to sleep during his duty hours. p. 154. In response, appellant chose to join the strikers on August 5. He called in and requested sick leave. It is absolutely clear that he was specifically told that leave could only be granted by Mr. Cooper. Post-Hearing Deposition, Mr. Ron Morgan, pp. 4-5. Yet, appellant did not call; he went to the union and his picture was taken at a facility where strike activity and picketing were taking place.

The evidence of record does not sup

a finding that appellant suffered threats or coercion sufficient to instill in him a reasonable fear of physical danger to himself or others which a person of ordinary firmness would not be expected to resist. Appellant, instead, made what may have been to him an extremely difficult decision; the pain of choosing the wrong side is not coercion.

Appellant Howard Smith

Appellant Smith was removed for striking on August 4 and 5. Appellant did not testify at his hearing.

The undisputed evidence of record is that appellant was scheduled for duty; he did not report for duty; and, he obtained no authorization for his absence. Appellant submitted no reply to his proposed removal.

An argument was made that appellant wa coerced. In support of that argument, evidence was provided by appellant's wife. In essence, she indicated that appellant felt he was between a rock a a hard place. TR, Smith, p. 41. The evidence, certainly, does not support any finding of coercion. I find that appellant engaged in a strike against the U.S. Government.

Appellant William Hetherington

Appellant Hetherington was removed fo striking on August 4 and 5. Appellant did not testify at his hearing.

Evidence of record reveals that appel lant was scheduled to work on August and 5; that he did not report for dut and, that his absence was unauthorize Appellant responded to his proposed removal notice and alleged, in essenc

that he was confused and/or coerced.

With regard to confusion, appellant indicated in his response that he had received a telegram on August 3 and he thought he was fired. His contention is without merit.

The telegram received by appellant indicates clearly that a strike was in progress, participation could result in removal, and that appellant should report for duty. AF, No. 7. Appellant received the telegram on his regular day off; he did not report for duty.

With regard to coercion, appellant indicated in his reply that he heard various threats and that he feared for his and his wife's safety. No specifics were provided.

No specifics were provided on appeal

either. Evidence was provided on appea
in the form of hearsay statements; tha
is, several individuals testified that
appellant had told them he (appellant)
was apprehensive and fearful regarding
the strike. Such evidence is hardly
supportive of the very personal defen
of coercion. Appellant did not testif
and at no point in these proceedings
he provided indication of any specifi
threats. An argument made on appellan
behalf is not evidence. I find that t
evidence does not support any finding
coercion.

In view of all of the above, I find t
the agency has established by more th
a preponderance of the evidence that
appellants did participate in a strik
as charged in the first specificatio
the notice of proposed removal.

A prima facie case of striking was

clearly established and was not rebutted by the appellants.

AWOL

The second charge against appellants is that they failed to report for duty and remained absent without authorization (AWOL) during the same periods they were charged with striking. All elements of the AWOL charge have been thoroughly discussed above and will not be repeated here. Based upon the testimony provided by the tower chiefs at the individual hearings and the agency's attendance records, I find that appellants did fail to report for duty and that their absences were unauthorized. The AWOL charges are sustained.

Efficiency of the Service

The remaining issue is whether on the

basis of the sustained charges appellants' removals were for such cause as will promote the efficiency of the service. 5 U.S.C. §7513(a).

With regard to the issue of nexus, I find that there is a rational relationship between the sustained charges and the efficiency of the service. Striking against the government obviously impairs the efficiency of the service for the same reasons that unauthorized absence does. Unauthorized absence from duty has been held to be proper grounds for some disciplinary action since by its very nature it disrupts the efficiency of the service. Desiderio v. Department of the Navy, 4 MSPB 171 (1980). In fact, courts have held that removal is an appropriate penalty for this of offense. 12/ There-

12/ Chiaverini v. U.S., 157 Ct. Cl. 37 (1962); Rubin v. U.S., 150 Ct. Cl. 28 (1960); Chiriaco v. U.S., 235 F.Supp. 850 (N.D. Ala. 1963); aff'd 339 F.2d 58 (5th Cir. 1964).

fore, I find that some disciplinary action is warranted in appellants' cases.

The reasonableness of the penalty here must be evaluated in view of the statute violated by appellants. 5 U.S.C. §7311 provides in pertinent part:

> An individual may not accept or hold a position in the Government of the United States or the Government of the District of Columbia if he -
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States or of the Government of the District of Columbia . . .

Thus, the plain language of the statute prohibits a person who participates in a

strike against the Federal Government from holding a position in the government. Although the statute does not specifically mandate the removal of a Federal employee who participates in a strike against the Federal Government, removal is obviously the only penalty which can produce the required result. 13/ The statutory language by itself is sufficient to persuade me that removal is a reasonable penalty for participating in a strike against the Government. However, I also note that in similar

13/ Since the language of the statute is plain, it controls unless there is a "clearly expressed legislative intention to the contrary," Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980), or unless it would lead to "absurd results". Commissioner v. Brown, 380 U.S. 563, 571 (1965). The legislative history of 5 U.S.C. 7311, Public Law 84-330 (1955), and Section 305 of the Taft Hartley Act, support an inference that Congress intended to require the discharge of persons who strike against the government. Further, Section 7311 is wholly consistent with other laws on this subject (5 U.S.C. §3333 and 18 U.S.C. §1918), and would not, therefore, lead to absurd results.

statutory penalty cases, the Board has observed that an agency may not impose and the Board may not approve lesser penalties than those prescribed by statute. In reviewing a case involving violation of 31 U.S.C. §638(c)(2) (misuse of a Government vehicle), the Board noted that the agency could not properly impose a lesser penalty than that provided by the statute. Woody v. General Service Administration, MSPB Docket No. SF07528110028 (June 2, 1981). In a settled case, the Board refused to approve an agreement reached by the parties because the settlement contemplated a penalty less than that required by statute. Special Counsel v. Dukes, MSPB Docket No. HQ120600020 (October 29, 1981).

The Ninth Circuit Court of Appeals has taken a similar position. In American Postal Workers Union AFL-CIO v. U.S.

Postal Service, 682 F.2d 1280 (9th Cir. 1982) [hereinafter cited as Murphy], the Court addressed the question of whether an arbitrator's decision requiring the Postal Service to reinstate an employee who had been removed for striking was illegal. The Court evaluated the facts of the case and concluded that the removed employee had participated in a strike and that his reinstatement would violate 5 U.S.C. §7311. Thus, the Ninth Circuit has interpreted the statute to require the appellant's removal. In fact the Court stated very clearly that "The choice of sanctions. . . is not arbitrable; that choice has already been made by Congress." Id. at 7.

In Schapansky, supra, the Board held that whether or not the penalty of removal is mandatory, it is clearly

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within the limits of reasonableness. 14/ The Board noted that participation in a strike disrupts the government's work and is a criminal offense under 18 U.S.C. 1918 (1980). In addition, the Board explained,

> the position of air traffic controller is a highly sensitive one because the incumbent is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the public who rely on him. A controller's intentional and ongoing abdication of that responsibility in order to participate in

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14/ The Board cited Murphy and noted that the 5 U.S.C. 7311 (1980) can be read to require removal. If removal is mandatory, the Board is generally precluded from mitigating the penalty, Special Counsel v. Dukes, MSPB Docket No. HQ120600020 (October 29, 1981).

> a strike and his decision to (strike) . . . despite the President's 48 hour grace period thus constitute particularly egregious conduct which destroys the controller's unique relationship of trust with his employer.

Schapansky, supra, at 11.

The Board found that removal for strik participation promotes the efficiency the service because there is a clear relationship between such misconduct the employee's ability to perform his job and the agency's ability to carry out its work. Based on Schapansky, I find that an employee's removal for striking promotes the efficiency of t service and is a reasonable penalty.

In view of all of the above, I find t removal of each appellant on the sus

tained charges was reasonable and that such action promotes the efficiency of the service.

Affirmative Defenses - Harmful Procedural Error

Even though an agency meets its initial burden, an action may not be sustained if it involves harmful procedural error, a prohibited personnel practice, or is otherwise not in accordance with law. 5 U.S.C. §7701(c)(2). See also, 5 C.F.R. §1201.56(b)(1). These are affirmative defenses to an otherwise legitimate agency action. The burden of proving all affirmative defenses rests with the appellant.

Martinez v. Department of Defense, 4 MSPB 109 (1980). The applicable standard of proof is preponderance of the evidence. Pinto v. Department of Labor,

MSPB Docket No. DE07528010140, slip op. at 2 (May 11, 1982).

Harmful procedural error has been defined by the Board at 5 C.F.R §1201.5 (c)(3), as "error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached." See also, Parker v. Defense Logistics Agency, 1 MSPB 489, 493 (1980). Actual prejudice must be shown the theoretical possibility of prejudi is not sufficient. Id.

Appellants argued that the FAA acted improperly in relying on the shortene notice period pursuant to 5 U.S.C. §7513(b). That section (b) provides t an employee is entitled to at least days' advance written notice of a proposed adverse action, unless there

reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, in which instance the employee is entitled to a reasonable time, but not less than seven days, to respond. In this case, the notices of proposed removal charged appellants with the violation of a statute for which a fine of not more than $1,000 or imprisonment for not more than one year and a day, or both, could be imposed. 15/ Appellants were given seven days to respond.

The Board in Martin v. Department of the Treasury, MSPB Docket No. AT075209044 (June 1, 1982), discussed what constitutes "reasonable cause" when invoking 5 U.S.C. §7513(b)(1), the so called "crime provision". The Board determined that an investigation in and

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15/ 18 U.S.C. §1918.

of itself was insufficient to give ris
to "reasonable cause" to invoke the
crime provision, but that an investi-
gation or arrest accompanied by other
circumstances as would give rise to
reasonable cause would be sufficient.
Cited as examples of these accompanyi
circumstances were arrest coupled wit
holding for further legal action by a
magistrate; an investigation resultin
in evidence supporting reasonable cau
and certain egregious acts detrimenta
to the accomplishment of the agency's
mission, such as murder or national
security offenses, brought to the
agency's attention via the news medi
Martin, id., at 910.

Although appellants were not arreste
and prosecuted for violating 18 U.S.
§1918, I hereby take official notice
the fact that various air traffic
controllers, who were similarly situ

to appellants, were. Therefore, I find that the fact that appellants were not arrested is irrelevant to the determination of whether there was "reasonable cause" to believe they had violated 18 U.S.C. §1918. I further find that appellants' act of striking against the Government in violation of the law and of the oath of office was an egregious act detrimental to the accomplishment of the agency's mission and that the seriousness of the offense properly gave rise to a reasonable cause to believe that appellants had committed a crime. Thus, I find that the agency had reasonable cause to invoke 5 U.S.C. §7513(b) allowing for the abbreviated notice period. Schapansky, supra.

Having found that the agency properly invoked 5 U.S.C. §7513(b), I must determine whether the amount of time

allowed for appellants' replies was reasonable.

Title 5 U.S.C. §7513(b)(2) requires a reasonable time but not less than 7 day be afforded for a response. Thus, any lesser amount of time would be error. The Board held in Land v. Federal Aviation Administration, MSPB Docket No CH07528110154 (July 21, 1982), that whe an employee is given at least 7 days bu still challenges the time period as unreasonable, the underlying circumstances must be examined to determi the reasonableness of the time period actually provided, as the courts did prior to the passage of the Civil Service Reform Act. 16/

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16/ 5 U.S.C. 7501(b)(3) (1978) provi only that employees be afforded a "reasonable time" for filing a writte answer to the charges.

Appellants argue on appeal that seven days was an insufficient amount of time within which to reply and that it was unreasonable for the agency to deny their requests made shortly after the issuance of the proposal notice for an extension of time.

In examining the record I note that the material relied upon was readily available at the facility; that the charges were simple and easy to comprehend; and that no emergency or unforseen exigency arose which would warrant an extension of time. Moreover, appellants have had an opportunity to submit in support of their appeals any and all evidence or argument that they would have submitted to the agency. They have failed to make even a minimal showing of how they were prejudiced by the agency's denial of their requests for an extension. Johnson v. Department of the Treasury,

MSPB Docket No. DC075209213 (August 27, 1982). Therefore, I find that appellants were afforded a reasonable time to respond.

It is a matter not disputed that after missing a deadline shift and after having been issued a proposal notice, each appellant was maintained in a non-duty, non-pay status until he was ultimately removed. Appellants argue that that action was a constructive suspension imposed without notice or any of the procedural protections for adverse actions provided by 5 U.S.C. 7513.

With regard to the notice period, generally, an employee against whom an adverse action, such as removal, is proposed is entitled to thirty days' advance written notice. 5 U.S.C. §7513-(b)(1). That notice period has been

determined to mean that the employee, ready, willing, and able to work, is entitled to be retained in a duty status with compensation for a full thirty days. See, 38 Comp. Gen. 203 (1958) and cases cited therein; Cade v. U.S. Postal Service, MSPB Docket No. SF07528010370, at 2, n. 1 (November 24, 1981). The notice period, however, may be reduced if "there is reasonable cause to believe the employee has committed a crime. . . ." The "crime provision" has been set forth in federal regulations at 5 C.F.R. 752.404(d). When the crime provision is invoked an agency may reduce the notice period to as little as seven days. If the circumstances require immediate action the agency may place the employee in a non-duty status with pay during the shortened period.

The "crime provision" clearly provides the agency an expedited procedure to

remove from the rolls "criminal" employees and to reduce the notice period entitlement of 5 U.S.C. 7513(b)(1) to a little as seven days. The reduction, of course, contemplates that the action will have been effected. The "crime provision" concerns shortening of the notice period, it has nothing at all to do with an employee's pay status during whatever shortened period is provided. 17/ Thus, an employee ready, willing, and able to work is entitled to a pay

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17/ That is, although, obviously, an employee will receive less pay if the notice period is shortened to, say, 9 days rather than 30, the "status" during the notice period is a pay status. The "not to exceed 10 days" language contained in the regulation appears to be an awkward effort to encourage agencies to accomplish a "crime provision" action in that maximum period of time. See, Federal Personnel Manual, Chapter 752, Subchapter 3-3b. OPM's interpretation is entitled to great deference. See, Munoz v. Department of Defense, 4 MSPB 258, 363 (1980).

status during the notice period of a proposed removal action regardless of whether he is accorded thirty days notice or the "crime provision" minimum of seven days or any period in between. See, Armand v. U.S., 136 Ct. Cl. 339 (1956).

The evidence of record reveals that appellants were in a non-pay status from the moment they missed their respective deadline shifts. The facility chiefs testified that this was done because the absent controllers were AWOL, which is by definition a nonduty and non-pay status. Appellants argue that because the agency has admitted that they would not have been allowed to return to work during this period, it was improper to consider them AWOL.

Appellants, of course, placed themselves in a non-duty, non-pay status by going

AWOL. That status was continued during the notice period. The issue thus is whether appellants made efforts to change that status and whether they we ready, willing and able to work.

Whether appellants were ready, willing and able to work can only be determine by examining the resons offered in explanation of their absences at or about the time of the placement in a non-pay status. Since all of the appe lants were AWOL, the agency was under obligation to change their voluntary unauthorized absence.

There is no evidence appellant Smith Hetherington attempted to return to during the notice period or contact agency during that period to express willingness to return. The proposal letter issued to each appellant make mention of status during the notice

period, and neither testified that he felt his return to work was precluded by the proposal letter. I find, therefore, that appellants Smith and Hetherington have not shown that they were in fact ready and willing to return to work and that, consequently, their absence from work during the notice period was not against their will. Therefore, I conclude that maintaining these individuals in a non-pay status during the notice period did not amount to error by the agency.

I further note that appellants were treated no differently than any other appellant who voluntarily absents himself or herself from duty and is then removed before he or she returns to duty. An employee whose removal is proposed is entitled to pay during the notice period, regardless of the charges. This is true even if the charge

is AWOL. But pay during the notice period of removal proposed even for A presupposes that the employee has returned to duty. An AWOL employee is not entitled to any pay until such ti as the employee returns. 5 C.F.R. §752.404(d)(1) is clearly intended to apply to a situation where an agency cannot suffer the presence of an othe wise ready, willing and able employee and the section reduces the employee notice period entitlement to as litt as 7 days. The crime provision has nothing at all to do with pay or non status during the notice period.

The evidence of record reveals howev that appellant Oswill attempted to return to work on the afternoon of August 6. TR, Oswill, p. 57. Since appellant indicated at that time tha was ready, willing, and able to retu to work he was entitled to be mainta

in a pay status during the notice period of his removal.

In review, I have found that appellants engaged in a strike and that they were AWOL as charged. Further, appellants have established no affirmative defenses. I have concluded that their removals promote the efficiency of the service.

DECISION

The removal action for each appellant is sustained. The agency is ordered to correct appellant Oswill's records to reveal a pay status during the notice period.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Febraury 23, 1983, unless a petition for review is filed with the Board within 35

calendar days of issuance of this decision.

Any party to this appeal, the Directo of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Prote tion Board. The petition shall set fo objections to this decision, supporte by references to applicable laws or regulations, and with specific refer to the record.

The petition for review must be file with the Secretary of the Merit Syst Protection Board, 1120 Vermont Avenu N.W., Washington, D.C. 20419. An inf ation copy of the petition should be filed with the presiding official at San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the office. 5 U.S.C. § 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(b)(1)

18/ the appellant has the right to se judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appea for the Federal Circuit not later tha 30 days after appellant's receipt of Board's final order of decision.

FOR THE BOARD:

Lonny A. Bartol
Presiding Offic

18/ As modified by Section 127 of t Federal Courts Improvement Act of 19 to be codified at 28 U.S.C. Section 1259(a)(9).

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

ROBERT E. HENRY*	)	DECISION NO.: SF075281F2513
v.	)	DATE: January 21, 1983
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION	)	

I. INTRODUCTION

By petition filed on September 20, 1981 with the San Francisco Regional Office of the Merit Systems Protection Board (Board) the appellant, Robert E. Henry,

* A consolidated hearing was held in Los Angeles, California beginning on November 1, 1982, for certain air traffic controllers formerly employed at the Los Angeles TRACON, Los Angeles Tower, Long Beach Tower, Hawthorne Tower and Torrance Tower. Mark E. Beck, Attorney at Law, representing appellants William S. Russell, Daniel J. Houlihan and Robert E. Henry, was present and participated in the consolidated portion of the hearing as well as in the individual hearings. Refer to John A. Crane, SF07521251, Master File.

appealed the action of the Department o Transportation, Federal Aviation Admin- istration (FAA), Western Region, Los Angeles, California which removed appellant from the position of Air Traffic Control Specialist, GS-11/1, effective September 2, 1981. Appel- lant's duty station was the Hawthorne Tower.

II. JURISDICTION

Appellant was an employee as defined b 5 U.S.C. 7511(a)(1)(A), and under the provisions of 5 U.S.C. 7512 and 5 U.S. 7513(d) was entitled to appeal the action to the Board, in accordance wit the appellate procedures as set forth 5 U.S.C. 7701.

III. BACKGROUND

On August 6, 1981, appellant was issue

a Notice of Proposed Removal which set forth the reasons for the action as follows:

> Reason 1. Violation of 5 U.S.C. 7311 which states in pertinent part, an individual may not accept or hold a position in the Government of the United States...if he... participates in a strike against the Government of the United States...and 18 U.S.C. 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

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Certificate of Service

I certify that a copy of the Decision in this case was served on the parties listed, by mail on February 21, 1983.

Jessie Lew

Office of the Secretary
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

Office of Policy Analysis
Office of Personnel Management
Rm. 3508 Attn: J. Neville
1900 E Street, N.W.
Washington, D.C. 20415

Office of the Special Counsel
Merit Systems Protection Board
450 Golden Gate Avenue
Box 36007, Rm. 11454
San Francisco, CA 94102

Office of the Deputy Managing Director
Merit Systems Protection Board
1120Vermont Avenue, N.W.
Washington, D.C. 20419

Director of Labor Relations
ALR-1
Federal Aviation Administration
400 7th Street, S.W.
Washington, D.C. 20590

Pers nnel Management Division AWE
Federal Aviation Administration
P.0. Box 92007
Worldway Postal Center
Los Angeles, CA 90009

Mark E. Beck
MILLER & NOLAN
8912 West Olympic Boulevard
Beverly Hills, CA 90211

William S. Russell
150 Larkhill Street
Thousand Oaks, CA 91360

Specification. Beginning at approximately 7:00 AM EDT on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 1400 on August 3, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States Government.

Reason No. 2. Unauthorized Absence.

Specification. Beginning first at the shift on August 3, 1981, you failed to report for your scheduled tour of duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress and that you must return to duty for your regularly scheduled shift. You failed to return to duty and instead remained absent without authorization.

The notice further informed appellant that the foregoing action gave the agency reasonable cause to believe that a crime had been committed for which a sentence of imprisonment could be imposed; therefore, the appellant was granted 7 calendar days to reply to the charges personally and in writing. 1/

/ / /

The appellant replied personally and in writing to the charges. A Notice of Final Decision was issued by the facility chief which effected the removal action. The decision letter informed the appellant of the appeal rights to the Board or through the negotiated grievance procedure.

In the petition of appeal, appellant requested a hearing. The hearing was held in Los Angeles, California, and the transcript of the hearing is a part of the appeal record.

IV. LAW, ANALYSIS, AND FINDINGS

A. General Law

In order for the agency to remove an employee for conduct-based reasons, the agency must establish three basic elements: 1) that the alleged conduct

did in fact occur; 2) that the efficiency of the service required some discipline; and (3) that the particular penalty was appropriate. 5 U.S.C. 7513(a). Allen v. United States Postal Service, 2 MSPB 582 (1980); Phillips v. Bergland 582 F.2d 1007, 1010 (4th Cir. 1978).

An adverse action promotes the efficiency of the service when the grounds for the action relate to "...either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interests..." McClelland v. Andrus, 606 F.2d 1279, 1291 (D.C. Cir. 1980), quoting Doe v. Hampton, 556 F.2d 272 (D.C. Cir. 1977). See also, Pezza v. Department of Health and Human Services, 3 MSPB 167 (1980). In particular, the FAA must make two separate showings with reference to the efficiency of the service. First, it

must establish that there is a nexus between the sustained charges and the efficiency of the service. That is, it must establish that some penalty would be appropriate. Second, it must establish that the penalty imposed was a reasonable one. A finding that the penalty was reasonable is a finding that the adverse action promoted the efficiency of the service. Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (April 10, 1981).

The decision by the FAA to remove the appellant must be supported by a preponderance of the evidence if it is to be sustained. 5 U.S.C. 7701(c)(1)(B). This Board has defined the preponderance standard as requiring evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue. Borninkhof v. Department of Justice, MSPB. Docket

No. SF075209008 (February 27, 1981); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). All of my findings of fact will be in terms of this preponderance standard.

Every element of the FAA case which rests on a finding of fact must be supported by a preponderance of the evidence. Douglas, supra, at 35. See also, Bavier v. Department of Transportation, MSPB. Docket No. SE075209009 (February 10, 1981); In re Van Sciver, 1 MSPB 94 (1979).

B. Strike Participation Law

The first and most important of the two stated charges is that appellants participated in a strike against the United States Government commencing on August 3, 1981, in violation of 5 U.S.C. 7311 and 18 U.S.C. 1918.

Section 7311, Title 5, United States Code, provides in pertinent part that an individual "may not accept or hold position in the Government of the United States" if he/she participated in a strike against the Government of the United States.

Section 1918, Title 18, United States Code, makes violation of section 7311 a crime and provides for a fine of not more than $1,000 or imprisonment for not more than one year and a day, or both.

C. Proof of Conduct

The charges against the appellant were set forth in the advance notices of proposed removal.

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Charge No. 1 - Participation in an Illegal Strike

The appellant was charged generally with participation in a strike against the Federal Aviation Administration in violation of two statutory provisions cited above. Appellant was specifically charged with and removed for having participated in the strike when he failed to report for duty as scheduled. Thus, the agency has the burden of proving that there was a strike on the dates charged, that the appellant failed to report for duty as scheduled, and that he participated in the strike.

With regard to the first element, the Board's regulation at 5 C.F.R. 1201.67 provides that a presiding official may take official notice of matters of common knowledge or matters that can be verified, and that such official notice

satisfies a party's burden of proof. The Board has held that such notice does not prevent a party from disputing the fact of which notice was taken. Ketchem v. Federal Aviation Administration, MSPB Docket No. DA075281F0713 (May 28, 1982), at 4, citing Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 301 (1937).

The Board discussed at length in Ketchem the propriety of officially noticing the commencement and duration of the Professional Air Traffic Controllers' Organization (PATCO) strike.

It concluded by taking official notice, subject to the right of refutation, that an unlawful strike of air traffic controllers commenced on August 3, 1981, and was still in progress on August 6, 1981. Further, it held that where an employee is charged with participation

in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned on that day.

Accordingly, I hereby take official notice that the strike was in progress from August 3, 1981 through August 6, 1981. The parties were afforded the opportunity to refute the matter to be officially noticed, and have not done so. I further find that the agency has met its burden of proving that the strike continued in progress long after August 6, 1981. The deciding official, as well as other management personnel, testified that the absenteeism rate for controllers continued at the same level as on August 3, 1981, and that the controllers who were scheduled to report after August 6, 1981 failed to report

for duty.

Picketing activities at various facilities in the Los Angeles area, as well as throughout the United States, continued and were given widespread television and newspaper coverage. The agency supported its position with copies of newspaper articles and photographs depicting strike activities after August 6, 1981. The agency officials testified that the PATCO leadership maintained its posture that the strike was still in progress through official proclamations and by its taped telephone communication to its members and supporters. No evidence was presented by appellant which refuted the fact that the strike continued on at least through August 3, 1981. Therefore, I find that the strike began on August 3, 1981, and was in progress at all times relevant to

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this appeal. 2/

Regarding the second element, appellant's participation in the strike, Board precedents provide ample guidance. The Board has held that, in a case where existence of a strike is a matter of general knowledge, the agency establishes a prima facie case that an employee voluntarily participated in the strike by presenting evidence of an employee's unauthorized absence from duty during the strike. Schapansky v. Department of Transportation, Federal

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2/ Notwithstanding my having officially noticed the strike, in his submissions appellant in no way attempted to rebut the agency's circumstantial evidence of the strike which included news media coverage of the strike; statements of PATCO officials; the fact that the employees wore buttons with slogans of the strike and otherwise spoke about the impending strike; notice from headquarters about the strike; President Reagan's announcement of August 3, 1981; and picketing activities at many FAA facilities in the Los Angeles area.

Aviation Administration, MSPB Docket No. DA075281F1130, slip opinion at 6, (October 28, 1982). The burden then shifts to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. Id. However, the agency retains the burden of proof to "ultimately establish appellant's participation by a preponderance of the evidence" pursuant to 5 U.S.C. 7701(c)(1)(B). Id., at 6, n. 2. The Board identified the gravamen of a charge of striking against the Government as "an employee's voluntary withholding of services in concert with others, and not his physical presence on a picket line...." Id. citing United Federation of Postal Clerks v. Blount, 325F. Supp. 879, 884 [D.D.C., aff'd, 404

U.S. 802 (1971), n. 3.]

Time and attendance reports in the record establish that appellant was scheduled to report for duty for identified shifts in August, 1981. These reports also stated that he did not report for duty on those days, and that he was not on approved leave.

Appellant's supervisor also testified that appellant was scheduled to work the cited days, that he was not present for duty, and that his absence had not been excused. The record, including the hearing presentation, reveals no contradictory evidence. I find, therefore, that appellant was absent on the cited dates without permission or excuse.

In this case the appellant was charged with failure to report for duty as scheduled beginning at 1400 hours on

August 3, 1981, and continuing thereafter until the issuance of the Notice of Proposed Removal, dated August 6, 1981. The agency submitted copies of all pertinent records and documents relied on to support the charges, including the time and attendance records, watch schedule, and personnel logs (sign-in sheets).

The watch schedule indicates that appellant was scheduled as follows: July 31 and August 1, regular days off; August 2, shift 15 (1406-2206); August 3, shift 14 (1400-2200); August 4, shift 11 (1100-1900); August 5, shift 7 (0700-1500); August 6, shift 14 (1400-2200); August 7 and 8, regular days off. Appellant's personal deadline date was August 6, 1981, 2:00PM.

In his written and oral replies to the charges, as well as in his appeal to the

Board, the appellant did not dispute the fact that he had failed to report for his regular tour of duty as charged.

In his written replies to the charges, appellant submitted the form letters supplied by PATCO, and designated James Walton, a PATCO official, as his representative. In his petition of appeal to the Board, appellant included a statement prepared by PATCO, and named Mr. Walton as his designated representative. On February 24, 1982, the appellant designated Mark E. Beck, Attorney at Law, to represent him during his appeal to the Board.

The appellant claimed that on August 3, 1981, when the strike began, he called Mr. James Page, Jr., who was the tower chief, and informed him that he would not report to duty because he was concerned about the safety of himself

and his family, since all of the controllers had supported the strike.

Mr. Page testified during the hearing and acknowledged that he had received a telephone call from the appellant. He stated the appellant told him he would not be in, because all of the controllers had supported the strike, and he was fearful for his personal safety and that of his family. Mr. Page stated that there was no picketing at the Hawthorne Tower and he had received no reports of any violence, or any threats to any of the controllers.

Mr. Page also testified that he was the oral reply officer, and during the oral reply, the appellant had told him that about a month before the strike, two PATCO controllers came to Hawthorne to talk to the controllers and himself about support of PATCO. He stated that

James R. Arbanas, a controller, and William Marple, a supervisor, were present at the time in the tower cab. The appellant testified that the two controllers had threatened him and one had grabbed him around the neck.

Mr. Page further testified that he contacted both Mr. Arbanas and Mr. Marple, and questioned them about the incident. They both confirmed the visit by the two PATCO controllers to the tower cab, and that the purpose of the visit was to confirm support of PATCO's objectives. They did not recall any physical or violent contact, but they did state that it was a heated discussion.

In his appeal to the Board, appellant's attorney argued that the appellant was very fearful as a result of this confrontation, and that the only reason

that he did not report to work was because he feared for the personal safety of himself and his wife. He stated that the appellant had talked to other controllers and to his father; and became convinced that PATCO was capable of carrying out its threats.

James R. Arbanas, air traffic controller, testified during the hearing that he was present in the tower cab when two people from PATCO visited them, obviously to obtain their support of the PATCO position during the negotiations. This occurred about one month before the strike. They were going to the various facilities to make sure that all of the controllers got the "word". He stated that the two people talked to both the Appellant and himself but had a longer conversation with the Appellant. He stated that the conversation became heated, and that one of them may have

pushed or jabbed the appellant on the shoulder to emphasize a point he was making.

Mr. Arbanas stated that he knew the appellant quite well and was aware that he was very concerned about his career and his future with the FAA if he did not support the PATCO position. He stated that there was a lot of peer pressure and the threat of PATCO was that if they did not support the strike they would not "check out" in the future.

Mr. Arbanas also stated that he was subjected to the same pressures and had to make a decision. He stated that he could not go out on strike because he had too much to lose.

Mr. William Marple, area supervisor, testified that he was in the cab when

the two PATCO people visited him about a month before the strike. He stated that the appellant was under his supervision. The two PATCO people talked to the appellant and Arabanas about the impending strike and told them of PATCO's position. He noted that the appellant was upset and was very apprehensive about checking out as a certified controller in the future. The appellant was planning eventually to transfer to Burbank, at a higher grade for career advancement, and he believed that he would not be able to do so unless he supported PATCO.

He stated that during the incident in the tower cab, a verbal confrontation occurred, with no physical contact, and that the voices were raised to a higher level.

Mr. Loyal E. Henry, retired air traffic

controller, and father of the appellant, stated that he had retired from the agency four years ago, after completing his career as a controller. He stated that he was aware of his son's position and that they had a close relationship. He often talked to the appellant concerning his future career with the agency. He stated that he expressed his opinion to the appellant and that in no way could he "iron man" through a TRACON position without the support of the PATCO members. He pointed out to the appellant that if he became a "scab", and PATCO won, he could never make it at the L.A. TRACON or the Burbank TRACON.

He further stated that the appellant never said that he would or would not support PATCO. However, he stated that he was very, very concerned about his future career with the agency.

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The appellant's wife testified also during the hearing and stated that the Appellant was very confused and concerned about his safety and his future.

The appellant did not testify in his own behalf during the hearing. His attorney stated that the appellant was on record as to his reasons for not reporting to duty and this was the result of coercion on the part of PATCO. He also argued that the appellant did not act in concert with anyone, and was not on strike, merely in an AWOL status. Consequently, he believed that the removal action was too severe and would not promote the efficiency of the service.

I find that these contentions by appellant do not meet the standards defined by the Board for establishing a defense of coercion and duress. The Board has

held that,

> "in order for a Federal employee charged with participation in a strike against the government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, 19/ that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist. (remaining footnotes not reproduced)

Johnson v. Department of Transportation, Federal Aviation Administration, MSPB Docket No. DC075281F0998 (November 10, 1982), at 11-12. 3/ Overheard state-

3/ As authority for the preponderance of the evidence standard in the above-quoted text, Johnson, supra, in note 19, cites 5 C.F.R. 1201.56(b) and 5 U.S.C. 7701(c)(2)(C). These sections are concerned with affirmative defenses, thereby suggesting that a showing of coercion could be regarded as an affirmative defense. However, elsewhere in the Johnson decision, and in other Board decisions, a showing of coercion was considered as a rebuttal to the agency's

(footnote continued on following page)

ments, menacing tones, and generalized threats directed toward all potential non-strikers and heard or observed by appellant are not sufficient to rebut the agency's prima facie case of striking. Johnson, supra, at 11. I find appellant's contentions do not meet the standards defined by the Board for establishing a defense of coercion. Lastly, the agency has established that appellant was personally advised of consequences resultant from striking against the Federal Government. The FAA had directed all tower chiefs to specifically inform each air traffic control-

(footnote 3 continued)

prima facie case of voluntary participation in a strike. See, e.g., Duckett and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (February 19, 1982) and Jones v. Tennessee Valley Authority, MSPB Docket No. AT0752810300 (February 19, 1982). Consequently, in the instant case, I am giving consideration to the claim of coercion in order to determine whether appellant has rebutted the agency's prima facie case of voluntary participation in the strike.

ler of the illegality of a strike, as set forth in the May 29, 1981 letter by J. Lynn Helms, FAA administrator. The tower chief testified that this directive was carried out during the month of June, 1981, that each controller was so informed, and that he or his subordinate had documented this warning.

In summary, the preponderance of the evidence established the following. Before the strike in issue, appellant was advised of its unlawful character; there was a strike against the Government for the relevant time period; appellant was scheduled to work, he failed to appear for duty; and he had neither permission nor excuse to absent himself.

Based on the above evidence, I find that the appellant has not rebutted the agency's prima facie showing that he

participated in a strike. Accordingly, I find that the agency has proved by a preponderance of the evidence that the appellant participated in an illegal strike against the Federal Government on the dates charged.

The agency's first charge is therefore sustained.

Charge No. 2

The agency's second charge is that appellant failed to report for his scheduled tour of duty and remained absent without authorization (AWOL) during the same period for which he is charged with being on strike. All elements of this charge have been thoroughly discussed above and will not be repeated here. I find that based upon appellant's admission, the testimony at the hearing, and the agency's

attendance records, appellant did fail to report for duty and that his absence was without authorization. The charge is sustained.

D. Efficiency of the Service

1. Nexus

Concerning nexus, I find that there is a rational relationship between the sustained charges and the efficiency of the service. In Schapansky, supra, the Board concluded that participation in a strike against the government by an employee of the Federal Government is a grave offense which by its very nature disrupts the performance of the government mission and the efficiency of the service. Id. at 10, n. 8.

Unauthorized absence from duty also disrupts the efficiency of the service

and warrants disciplinary action including removal. Desiderio v. Department of the Navy, 4 MSPB 171 (1980).

Discipline is therefore warranted.

2. Reasonableness of the Penalty

The purpose of Board review of the penalty selected is "to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness." Douglas, supra, at 28. When the Board does find that a penalty is excessive, the corrected penalty to be specified by the Board is not the penalty which the Board itself would find to be reasonable, but instead is the maximum penalty that would be "within the parameters of reasonableness". Davis v. Department of Transportation, Docket No. NY075209075 (October 2, 1981).

The reasonableness of the penalty of removal here must be evaluated in light of the previously cited statute, 5 U.S.C. 7311, which prohibits a person from holding a position in the Government if he participates in a strike against the Government. Since the language of the statute is plain, it controls unless there is a "clearly expressed legislative intention to the contrary." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980), or unless it would lead to "absurd results." Commission v. Brown, 380 U.S. 563, 571 (1965). 4/ In Schapansky, supra, the Board noted that 5 U.S.C. 7311 could be read to

4/ The legislative history of 5 U.S.C. 7311, Pub. L. No. 84-330 (1955), and Section 305 of the Taft-Hartley Act, supports an inference that Congress intended to require the discharge of persons who strike against the Government. Further, Section 7311 is wholly consistent with other laws on this subject (Section 3333) and 18 U.S.C. (1918), and would not, therefore, lead to absurd results.

require removal as a mandatory penalty for striking against the Federal Government. After noting that this position had been taken by at least one federal circuit court, the Board held that it was not necessary to decide as a matter of law whether such a penalty was required in a similar case of an air traffic controller found to have been on strike and unauthorized absence from August 3 to August 6, 1981. 5/ It held, as I do here, that no satisfactory basis for mitigation exists in the case. The gravity of the offense is patent. Section 5 U.S.C. 7311, reflects the considered belief of Congress that discharge for participation in a strike against the Federal Government warrants removal. Such conduct is a criminal offense for which imprisonment may be imposed. 18 U.S.C. 1918. The position

5/ American Postal Workers v. U.S. Postal Service, 682 F.2d 1280, 285 (9th Cir. 1982).

of Air Traffic Controller is a highly sensitive one, as noted by the Board, since a controller is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the general public. Borsari v. Federal Aviation Administration, MSPB Docket No. NY0752209163, at 5-7 (June 24, 1982). The controller's intentional participation in a strike and failure to perform his duty is particularly egregious conduct which destroys the relationship of trust between employer and employee. Schapansky, supra.

Finally, appellant signed an affidavit upon his appointment to the agency that he would not strike against the Government. By striking, he violated that oath, thus undermining the agency's confidence in appellant's integrity and ability to perform his assigned duties.

I find that under Douglas, supra, the agency imposed penalty is not clearly excessive or disproportionate to the sustained charge of striking against the agency. The penalty is reasonable and the removal action promotes the efficiency of the service. Johnson, supra at 16.

V. AFFIRMATIVE DEFENSES

Even though the agency has met its burden of proof, appellant's removal may not be sustained if appellant shows harmful error in the application of the agency's procedures in arriving at such decision, shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b),

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6/ or shows that the decision was not in accordance with law. The appellant has the burden of proof in establishing these affirmative defenses. 7/

Pay Status During the Notice Period.

The appellant specifically raised the issue in his appeal to the Board that the agency failed to place him in a duty and pay status, or in a nonduty with pay status, during the advance notice period, in accordance with 5 C.F.R. 752.404(d)(1). He claimed that on August 24, 1981, he had clearly notified his facility chief that he was ready, willing and able to return to duty. Nevertheless, the facility chief refused to allow him to return to duty and maintained him in a nonduty and nonpay

6/ 5 U.S.C. 7701(c)(2)(A)-(B)

7/ 5 C.F.R. 1201.56(b)(1)-(2). Martinez v. Department of Defense, 4 MSPB 109 (1980).

status during the remainder of the notice period.

Title 5 U.S.C. §7513 (b)(1) provides for the shortened notice period of not less than seven (7) days where the crime provision has been properly invoked, as it has been in this case. The implementing regulations, 5 C.F.R. §752.404 (d)(1), provide that when the circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time not to exceed 10 days, as is necessary to effect the action.

When the agency issued the Notice of Proposed Removal, the appellant was in an AWOL status as the result of his failure to report for his regularly scheduled tour of duty, as previously discussed. The testimony and evidence of record reveal that the agency,

through its facility chief, would not allow any striking controller to return to a duty status after he had missed his individual deadline date. The appellant was maintained in a nonduty and nonpay status during the notice period until the effective date of his removal. The appellant contends that this was a procedural error and not in conformance with the adverse action regulations. He claims that he should have been placed in an active duty pay status because after receiving the proposed removal notice, he had personally contacted his facility chief and informed him of his desire to return to active duty. At that point, appellant was ready, willing, and able to return to duty, but he was not allowed to do so.

The major Board decision on this issue is Davis v. Tennessee Valley Authority, MSPB Docket No. AT07528110206 (May 10,

1982), in which it was held that where the agency had reasonable cause to believe the appellant altered and passed a forged instrument, the appellant was entitled to a "reasonable time but not less than seven (7) days..." during which time he was entitled to be retained in a pay status.

The clear implication of the Board's decision is that during the notice period of a removal action or a suspension based on the "crime provision", employees are to be retained in a pay status. See also, Johnson v. Department of the Treasury, MSPB Docket Nos. DC07522092213/1 (August 24, 1982); and Ratley v. Department of the Army, MSPB Docket No. AT07528110338 (September 17, 1982).

Apparently this was also the position of the agency as expressed in GENOT 128,

page 3, para. 4, which specifically states, "Controllers who appear for duty after the appropriate deadline has passed shall be placed in a non-duty status NTE 10 calendar days." (Emphasis added.)

I find that the appellant should have been placed in a pay status after he notified his facility chief that he was now ready, willing, and able to return to duty. The agency had the option to place the Appellant in a duty status, or in a nonduty paid status, for a period not to exceed 10 days. However, as previously discussed, I find that the failure on the part of the agency to comply with the above-cited statute and regulation does not constitute a fatal procedural defect or harmful error because the error can be corrected. Accordingly, I direct the agency to retroactively place appellant in a pay

status for that period of time during the notice period when he should have been on a nonduty paid status, until the effective date of the removal action.

VI. CONCLUSION

Having found that the charges against the appellant are supported by a preponderance of the evidence, that removal was a reasonable penalty, and that the appellant has not successfully presented any affirmative defenses, I find that the removal action must be sustained.

VII. DECISION

The action of the FAA in removing the appellant from his position of Air Traffic Control Specialist is sustained.

This decision is an initial decision and will become a final decision of the

Merit Systems Protection Board on February 23, 1983 unless a petition for review is filed with the Board within thirty-five (35) calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. An information copy of the petition should be filed with the Presiding Official at

the San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of the Office of Personnel Management may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the

jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(B)(1) 8/ the Appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005 not later than thirty (30) days after the Appellant's receipt of the Board's final order or decision.

FOR THE BOARD:

THOMAS J. MANGAN
PRESIDING OFFICIAL

8/ As modified by Section 127 of the Federal Courts Improvement Act of 1982 to be codified at 28 U.S.C. Section 1259(a)(9).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

DANIEL J. HOULIHAN*	)	
	)	DECISION NO.:
v.	)	SF075281F2579
	)	
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION	)	DATE: January 21, 1983

I. INTRODUCTION

By petition filed on September 14, 1981 with the San Francisco Regional Office of the Merit Systems Protection Board (Board) the appellant, Daniel J. Houlihan, appealed the action of the Department of Transportation, Federal

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* A consolidated hearing was held in Los Angeles, California beginning on November 1, 1982, for certain air traffic controllers formerly employed at the Los Angeles TRACON, Los Angeles Tower, Long Beach Tower, Hawthorne Tower and Torrance Tower. Mark E. Beck, Attorney At Law, representing William S. Russell, Daniel J. Houlihan and Robert E. Henry, was present and participated in the consolidated portion of the hearing, as well as in the individual hearings. Refer to John A. Crane, SF075281F2514, Master File.

Aviation Administration (FAA), Western Region, Los Angeles, California which removed appellant from the position of Air Traffic Control Specialist, GS-14/2, effective August 28, 1981. Appellant's duty station was the Los Angeles TRACON.

II. JURISDICTION

Appellant was an employee as defined by 5 U.S.C. 7511(a)(1)(A), and under the provisions of 5 U.S.C. 7512 and 5 U.S.C. 7513(d) was entitled to appeal the action to the Board, in accordance with the appellate procedures as set forth in 5 U.S.C. 7701.

III. BACKGROUND

On August 10, 1981, appellant was issued a Notice of Proposed Removal which set forth the reasons for the action as follows:

> Reason 1. Violation of 5 U.S.C. 7311 which states in pertinent part, an individual may not accept

> or hold a position in the Government of the United States...if he...participates in a strike against the Government of the United States...and 18 U.S.C. 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> Specification. Beginning at approximately 7:00 AM EDT on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 2:36 PM PDT on August 3, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States Government.
>
> Reason No. 2. Unauthorized Absence.
>
> Specification. Beginning first at the 1436 shift on August 3, 1981, you failed to report for you scheduled tour of duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress and that you must return to duty for your regularly scheduled shift. You failed to return to duty and instead remained absent without authorization.

The notice further informed appellant that the foregoing action gave the agency reasonable cause to believe that a crime had been committed for which a sentence of imprisonment could be

imposed; therefore, the appellant was granted 7 calendar days to reply to the charges personally and in writing. 1/

The appellant replied personally and in writing to the charges. A Notice of Final Decision was issued by the facility chief which effected the removal action. The decision letter informed the appellant of the appeal rights to the Board or through the negotiated grievance procedure.

In the petition of appeal, appellant requested a hearing. The hearing was held in Los Angeles, California, and the transcript of the hearing is a part of the appeal record.

IV. LAW, ANALYSIS, AND FINDINGS

A. General Law

In order for the agency to remove an Employee for conduct-based reasons, the agency must establish three basic elements: 1) that the alleged conduct did in fact occur; 2) that the efficiency of the service required some discipline; and (3) that the particular penalty was appropriate. 5 U.S.C. 7513(a). Allen v. United States Postal Service, 2 MSP 582 (1980); Phillips v. Bergland 582 F.2d 1007, 1010 (4th Cir. 1978).

An adverse action promotes the efficiency of the service when the grounds for the action relate to "...either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interests..." McClelland v. Andrus, 606 F.2d 1279, 1291 (D.C. Cir. 1980), quoting Doe v. Hampton, 556 F.2d 272 (D.C. Cir. 1977). See also, Pezza v. Department of

Health and Human Services, 3 MSPB 167 (1980). In particular, the FAA must make two separate showings with reference to the efficiency of the service. First, it must establish that there is a nexus between the sustained charges and the efficiency of the service. That is, it must establish that some penalty would be appropriate. Second, it must establish that the penalty imposed was a reasonable one. A finding that the penalty was reasonable is a finding that the adverse action promoted the efficiency of the service. Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (April 10, 1981).

The decision by the FAA to remove the appellant must be supported by a preponderance of the evidence if it is to be sustained. 5 U.S.C. 7701(c)(1)(B). This Board has defined the preponderance standard as requiring evidence that a

reasonable person would accept as sufficient to find a contested fact more probably true than untrue. Borninkhof v. Department of Justice, MSPB. Docket No. SF075209008 (February 27, 1981); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). All of my findings of fact will be in terms of this preponderance standard.

Every element of the FAA case which rests on a finding of fact must be supported by a preponderance of the evidence. Douglas, supra, at 35. See also, Bavier v. Department of Transportation, MSPB. Docket No. SE075209009 (February 10, 1981); In re Van Sciver, 1 MSPB 94 (1979).

B. Strike Participation Law

The first and most important of the two stated charges is that appellants

participated in a strike against the United States Government commencing on August 3, 1981, in violation of 5 U.S.C. 7311 and 18 U.S.C. 1918.

Section 7311, Title 5, United States Code, provides in pertinent part that an individual "may not accept or hold position in the Government of the United States" if he/she participated in a strike against the Government of the United States.

Section 1918, Title 18, United States Code, makes violation of section 7311 a crime and provides for a fine of not more than $1,000 or imprisonment for not more than one year and a day, or both.

C. Proof of Conduct

The charges against the appellant were

set forth in the advance notices of proposed removal.

Charge No. 1 - Participation in an Illegal Strike

The appellant was charged generally with participation in a strike against the Federal Aviation Administration in violation of two statutory provisions cited above. Appellant was specifically charged with and removed for having participated in the strike when he failed to report for duty as scheduled. Thus, the agency has the burden of proving that there was a strike on the dates charged, that the appellant failed to report for duty as scheduled, and that he participated in the strike.

With regard to the first element, the Board's regulation at 5 C.F.R. 1201.67 provides that a presiding official may

take official notice of matters of common knowledge or matters that can be verified, and that such official notice satisfies a party's burden of proof. The Board has held that such notice does not prevent a party from disputing the fact of which notice was taken. Ketchem v. Federal Aviation Administration, MSPB Docket No. DA075281F0713 (May 28, 1982), at 4, citing Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 301 (1937).

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Accordingly, I hereby take official notice that the strike was in progress from August 3, 1981 through August 6, 1981. The parties were afforded the opportunity to refute the matter to be officially noticed, and have not done so. I further find that the agency has met its burden of proving that the strike continued in progress long after August 6, 1981. The deciding official, as well as other management personnel, testified that the absenteeism rate for controllers continued at the same level

as on August 3, 1981, and that the controllers who were scheduled to report after August 6, 1981 failed to report for duty.

Picketing activities at various facilities in the Los Angeles area, as well as throughout the United States, continued and were given widespread television and newspaper coverage. The agency supported its position with copies of newspaper articles and photographs depicting strike activities after August 6, 1981. The agency officials testified that the PATCO leadership maintained its posture that the strike was still in progress through official proclamations and by its taped telephone communication to its members and supporters. No evidence was presented by appellant which refuted the fact that the strike continued on at least through August, 1981. Therefore, I find that the strike

began on August 3, 1981, and was in progress at all times relevant to this appeal. 2/

Regarding the second element, appellant's participation in the strike, Board precedents provide ample guidance. The Board has held that, in a case where existence of a strike is a matter of general knowledge, the agency establishes a prima facie case that an employee voluntarily participated in the strike by presenting evidence of an employee's unauthorized absence from duty during the strike. Schapansky v.

2/ Notwithstanding my having officially noticed the strike, in his submissions appellant in no way attempted to rebut the agency's circumstantial evidence of the strike which included news media coverage of the strike; statements of PATCO officials; the fact that the employees wore buttons with it slogans of the strike and otherwise spoke about the impending strike; notice from headquarters about the strike; President Reagan's announcement of August 3, 1981; and picketing activities at many FAA facilities in the Los Angeles area.

Department of Transportation, Federal Aviation Administration, MSPB Docket No. DA075281F1130, slip opinion at 6, (October 28, 1982). The burden then shifts to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. Id. However, the agency retains the burden of proof to "ultimately establish appellant's participation by a preponderance of the evidence" pursuant to 5 U.S.C. 7701(c)-(1)(B). Id., at 6, n. 2. The Board identified the gravamen of a charge of striking against the Government as "an employee's voluntary withholding of services in concert with others, and not his physical presence on a picket line...." Id. citing United Federation of Postal Clerks v. Blount, 325F. Supp.

879, 884 [D.D.C., aff'd, 404 U.S. 802 (1971), n. 3.]

Time and attendance reports in the record establish that appellant was scheduled to report for duty for identified shifts in August, 1981. These reports also stated that he did not report for duty on those days, and that he was not on approved leave.

Appellant's supervisor also testified that appellant scheduled to work the cited days, that he was not present for duty, and that his absence had not been excused. The record, including the hearing presentation, reveals no contradictory evidence. I find, therefore, that appellant was absent on the cited dates without permission or excuse.

In this case appellant was charged with failure to report for duty on August 3,

1981 at 2:30 PM, 1981 and continuing until issuance of the Notice of Proposed Removal, August 10, 1981. The agency submitted copies of all pertinent records and documents relied on to support the charges, including time and attendance records, watch schedules, and the personnel logs (sign-in sheets).

The appellant did not dispute the fact that he had failed to report for duty as scheduled as set forth in the charge letter.

The watch schedule indicates that the appellant was scheduled for duty as follows: August 3, at 1436 hours; August 4, at 1330 hours; August 5, 6, and 7 at 0642 hours. Appellant's personal deadline was August 6 at 0642 hours.

In his written response to the charges

dated August 17, 1981, appellant submitted the form letter requesting additional time, which was furnished to him by PATCO. He designated Ancel Young, a PATCO official, as his representative.

Mr. Lloyd Golden, deputy facility chief and deciding official, testified during the hearing that the appellant made an oral reply to him. In the oral reply, he stated that the appellant claimed that he did not report to work because he was under duress from the members of PATCO who let it be known that he would not "check-out" at the L.A. TRACON unless he supported PATCO in the strike. He had talked to other controllers in the same situation and the prevailing attitude was that he had better support PATCO's goals if he wanted any career as a controller.

Mr. Golden further testified that the

appellant acknowledged that no personal threats were made specifically to him, and that his primary concern was not "checking out" as a future air traffic controller.

Mr. Donald L. Meir, evaluation and development specialist, L.A. TRACON, testified that he knew the appellant as one of the developmental controllers at the TRACON. It was his responsibility to oversee their training. He knew from discussions and conversations at the facilities that there was a great deal of peer pressure placed on all controllers to support PATCO in the strike. All of the on-the-job instructors were members of PATCO, and the controllers were fearful that they would not become certified unless they supported PATCO's position and went on strike.

In his petition of appeal to the Board,

the appellant stated that he believed the agency was wrong in removing him from his position. He also named Herman J. Pettus, a PATCO official, as his designated representative. By letter dated January 25, 1982, appellant named himself as representative in his appeal. On February 22, 1982, appellant designated Mark E. Beck, Attorney- At-Law, to represent him in his appeal to the Board.

In his testimony during the hearing, the appellant claimed that he did not report for his scheduled tour of duty because he was coerced and intimidated by PATCO, and was fearful for his personal safety.

He admitted that he had not received any personal, direct threats to himself, as he kept a very "low profile" at the TRACON; however, he had heard of rumors and threats to other controllers and he

was convinced that PATCO could carry out those threats. He explained that he had only been at he L.A. TRACON for a couple of months, and that he was convinced that he would never achieve certification if he opposed PATCO in the strike.

Appellant also claimed that he had been threatened by a member of PATCO, who threatened to shoot anyone who did not go on strike, and who returned to work. He stated that this threat occurred on August 5, after he had failed to report for duty.

Appellant also admitted that he did participate in picketing on August 5. Under cross-examination, appellant admitted that the alleged threats that he had received came after the start of the strike on August 3, 1981, and were impersonal and indirect.

Appellant further maintained that he was forced to participate in the strike by PATCO by economic coercion. He was threatened with not being certified at the L.A. TRACON, because PATCO controlled the training, and its members would take reprisal against him and see that he would not pass the training. This would have an adverse effect on his career advancement and his economic return in the near future. It was the appellant's position that he was merely AWOL and not participating or acting in concert with others in an illegal strike against the Government.

I find that these contentions by appellant do not meet the standards defined by the Board for establishing a defense of coercion and duress. The Board has held that,

> "In order for a Federal employee charged with participation in a

> strike against the government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, 19/ that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist. (remaining footnotes not reproduced)

Johnson v. Department of Transportation, Federal Aviation Administration, MSPB Docket No. DC075281F0998 (November 10, 1982), at 11-12. 3/ Overheard state-

3/ As authority for the preponderance of the evidence standard in the above-quoted text, Johnson, supra, in note 19, cites 5 C.F.R. 1201.56(b) and 5 U.S.C. 7701(c)(2)(C). These sections are concerned with affirmative defenses, thereby suggesting that a showing of coercion could be regarded as an affirmative defense. However, elsewhere in the Johnson decision, and in other Board decisions, a showing of coercion was considered as a rebuttal to the agency's prima facie case of voluntary participation in a strike. See, e.g., Duckett and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (February 19, 1982) and Jones v. Tennessee Valley Authority, MSPB Docket No. AT07528010300 (February 19, 1982). Consequently, in the instant case, I am giving consideration to the claim of (Footnote 3 continued)

ments, menacing tones, and generalized threats, directed toward all potential non-strikers and heard or observed by appellant are not sufficient to rebut the agency's prima facie case of striking. Johnson, supra, at 11. I find appellant's contentions do not meet the standards defined by the Board for establishing a defense of coercion.

Lastly, the agency has established that appellant was personally advised of consequences resultant from striking against the Federal Government. The FAA had directed all tower chiefs to specifically inform each air traffic controller of the illegality of a strike, as set forth in the May 29, 1981 letter by J. Lynn Helms, FAA administrator. The

(Footnote 3 continued) coercion in order to determine whether appellant has rebutted the agency's prima facie case of voluntary participation in the strike.

tower chief testified that this directive was carried out during the month of June, 1981, that each controller was so informed, and that he or his subordinate had documented this warning.

In summary, the preponderance of the evidence established the following. Before the strike in issue, appellant was advised of its unlawful character; there was a strike against the Government for the relevant time period; appellant was scheduled to work, he failed to appear for duty; and he had neither permission nor excuse to absent himself.

Based on the above evidence, I find that the appellant has not rebutted the agency's prima facie showing that he participated in a strike. Accordingly, I find that the agency has proved by a preponderance of the evidence that the

appellant participated in an illegal strike against the Federal Government on the dates charged.

The agency's first charge is therefore sustained.

Charge No. 2

The agency's second charge is that appellant failed to report for his scheduled tour of duty and remained absent without authorization (AWOL) during the same period for which he is charged with being on strike. All elements of this charge have been thoroughly discussed above and will not be repeated here. I find that based upon appellant's admission, the testimony at the hearing, and the agency's attendance records, appellant did fail to report for duty and that his absence

was without authorization. The charge is sustained.

D. Efficiency of the Service

1. Nexus

Concerning nexus, I find that there is a rational relationship between the sustained charges and the efficiency of the service. In Schapansky, supra, the Board concluded that participation in a strike against the government by an employee of the Federal Government is a grave offense which by its very nature disrupts the performance of the government mission and the efficiency of the service. Id. at 10, n. 8.

Unauthorized absence from duty also disrupts the efficiency of the service and warrants disciplinary action includ-

ing removal. Desiderio v. Department of the Navy, 4 MSPB 171 (1980).

Discipline is therefore warranted.

2. Reasonableness of the Penalty

The purpose of Board review of the penalty selected is "to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness." Douglas, supra, at 28.

When the Board does find that a penalty is excessive, the corrected penalty to be specified by the Board is not the penalty which the Board itself would find to be reasonable, but instead is the maximum penalty that would be "within the parameters of reasonableness". Davis v. Department of Transportation, Docket No. NY075209075 (October 2, 1981).

The reasonableness of the penalty of removal here must be evaluated in light of the previously cited statute, 5 U.S.C. 7311, which prohibits a person from holding a position in the Government if he participates in a strike against the Government. Since the language of the statute is plain, it controls unless there is a "clearly expressed legislative intention to the contrary." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980), or unless it would lead to "absurd results." Commission v. Brown, 380 U.S. 563, 571 (1965). 4/

4/ The legislative history of 5 U.S.C. 7311, Pub. L. No. 84-330 (1955), and Section 305 of the Taft-Hartley Act, supports an inference that Congress intended to require the discharge of persons who strike against the Government. Further, Section 7311 is wholly consistent with other laws on this subject (Section 3333) and 18 U.S.C. (1918), and would not, therefore, lead to absurd results.

In Schapansky, supra, the Board noted that 5 U.S.C. 7311 could be read to require removal as a mandatory penalty for striking against the Federal Government. After noting that this position had been taken by at least one federal circuit court, the Board held that it was not necessary to decide as a matter of law whether such a penalty was required in a similar case of an air traffic controller found to have been on strike and unauthorized absence from August 3 to August 6, 1981. 5/ It held, as I do here, that no satisfactory basis for mitigation exists in the case. The gravity of the offense is patent. Section 5 U.S.C. 7311, reflects the considered belief of Congress that discharge for participation in a strike against the Federal Government warrants removal. Such conduct is a criminal

5/ American Postal Workers v. U.S. Postal Service, 682 F.2d 1280, 285 (9th Cir. 1982).

offense for which imprisonment may be imposed. 18 U.S.C. 1918. The position of Air Traffic Controller is a highly sensitive one, as noted by the Board, since a controller is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the general public. Borsari v. Federal Aviation Administration, MSPB Docket No. NY0752209163, at 5-7 (June 24, 1982). The controller's intentional participation in a strike and failure to perform his duty is particularly egregious conduct which destroys the relationship of trust between employer and employee. Schapansky, supra.

Finally, appellant signed an affidavit upon his appointment to the agency that he would not strike against the Government. By striking, he violated that oath, thus undermining the agency's

confidence in appellant's integrity and ability to perform his assigned duties.

I find that under Douglas, supra, the agency imposed penalty is not clearly excessive or disproportionate to the sustained charge of striking against the agency. The penalty is reasonable and the removal action promotes the efficiency of the service. Johnson, supra at 16.

V. AFFIRMATIVE DEFENSES

Even though the agency has met its burden of proof, appellant's removal may not be sustained if appellant shows harmful error in the application of the agency's procedures in arriving at such decision, shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b),

6/ or shows that the decision was not in accordance with law. The appellant has the burden of proof in establishing these affirmative defenses. 7/

Pay Status During the Notice Period.

The appellant specifically raised the issue in his appeal to the Board that the agency failed to place him in a duty and pay status, or in a nonduty with pay status, during the advance notice period, in accordance with 5 C.F.R. §752.404(d)(1). He claimed that on August 19, 1981, he had clearly notified his facility chief that he was ready, willing and able to return to duty. Nevertheless, the facility chief refused to allow him to return to duty and maintained him in a nonduty and nonpay

6/ 5 U.S.C. 7701(c)(2)(A)-(B)
7/ 5 C.F.R. 1201.56(b)(1)-(2). Martinez v. Department of Defense, 4 MSPB 109 (1980).

status during the remainder of the notice period.

Title 5 U.S.C. §7513 (b)(1) provides for the shortened notice period of not less than seven (7) days where the crime provision has been properly invoked, as it has been in this case. The implementing regulations, 5 C.F.R. §752.404 (d)(1), provide that when the circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time not to exceed 10 days, as is necessary to effect the action.

When the agency issued the Notice of Proposed Removal, the appellant was in an AWOL status as the result of his failure to report for his regularly scheduled tour of duty, as previously discussed. The testimony and evidence of record reveal that the agency,

through its facility chief, would not allow any striking controller to return to a duty status after he had missed his individual deadline date. The appellant was maintained in a non-duty and nonpay status during the notice period until the effective date of his removal. The appellant contends that this was a procedural error and not in conformance with the adverse action regulations. He claims that he should have been placed in an active duty pay status because after receiving the proposed removal notice, he had personally contacted his facility chief and informed him of his desire to return to active duty. At that point, appellant was ready, willing, and able to return to duty, but he was not allowed to do so.

The major Board decision on this issue is Davis v. Tennessee Valley Authority, MSPB Docket No. AT07528110206 (May 10,

1982), in which it was held that where the agency had reasonable cause to believe the appellant altered and passed a forged instrument, the appellant was entitled to a "reasonable time but not less than seven (7) days..." during which time he was entitled to be retained in a pay status.

The clear implication of the Board's decision is that during the notice period of a removal action or a suspension based on the "crime provision", employees are to be retained in a pay status. See also, Johnson v. Department of the Treasury, MSPB Docket Nos. DC07522092213/4 (August 24, 1982); and Ratley v. Department of the Army, MSPB Docket No. AT07528110338 (September 17, 1982).

Apparently this was also the position of the agency as expressed in GENOT 128,

page 3, para. 4, which specifically states, "Controllers who appear for duty after the appropriate deadline has passed shall be placed in a non duty status NTE 10 calendar days." (Emphasis added.)

I find that the appellant should have been placed in a pay status after he notified his facility chief that he was now ready, willing, and able to return to duty. The agency had the option to place the appellant in a duty status, or in a nonduty paid status, for a period not to exceed 10 days. However, as previously discussed, I find that the failure on the part of he agency to comply with the above-cited statute and regulation does not constitute a fatal procedural defect or harmful error because the error can be corrected. Accordingly, I direct the agency to retroactively place appellant in a pay

status for that period of time during the notice period when he should have been on a nonduty paid status, until the effective date of the removal action.

VI. CONCLUSION

Having found that the charges against the appellant are supported a preponderance of the evidence, that removal was a reasonable penalty, and that the appellant has not successfully presented any affirmative defenses, I find that the removal action must be sustained.

VII. DECISION

The action of the FAA in removing the appellant from his position of Air Traffic Control Specialist is sustained.

This decision is an initial decision and will become a final decision of the

Merit Systems Protection Board on February 23 1983 unless a petition for review is filed with the Board within thirty-five (35) calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. An information copy of the petition should

be filed with the Presiding Official at the San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 23, 1983 unless a petition for review is filed with the Board within thirty-five (35) calendar days of issuance of this decision.

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The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is

available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of the Office of Personnel Management may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(B)(1) 8/ the Appellant has the right to seek

8/ As modified by Section 127 of the Federal Courts Improvement Act of 1982 to be codified at 28 U.S.C. Section 1259(a)(9).

judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005 not later than thirty (30) days after the Appellant's receipt of the Board's final order or decision.

FOR THE BOARD:

THOMAS J. MANGAN
PRESIDING OFFICIAL

APPENDIX "H"

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM S. RUSSELL	)	
v.	)	DOCKET NUMBER SF075281F2569
DEPARTMENT OF TRANSPORTATION	)	

OPINION AND ORDER

William S. Russell (appellant) petitioned the Board's San Francisco Regional Office for appeal of the action of the Department of Transportation's Federal Aviation Administration (agency) removing him from the position of Air Traffic Control Specialist based on charges of strike participation and unauthorized absence.

The presiding official sustained the agency's removal action, finding that the agency's charges were supported by a preponderance of the evidence and that the penalty of removal was appropriate. However, the presiding official also found that because appellant had notified the agency

that he was ready, willing, and able to return to work after receiving the notice of proposed removal, appellant's placement in a nonduty, nonpay status during the removal notice period constituted an improper suspension. Initial Decision at 13. The presiding official, therefore, reversed the suspension.

Both appellant and the agency have now petitioned the Board for review of the presiding official's initial decision. In his petition for review, appellant alleges harmful error by the agency and reversible error by the presiding official in sustaining his removal. We find that the specific legal issues raised have been addressed and resolved by the Board in other related cases, and that the presiding official's findings are essentially consistent with ours, and that any inconsistency in the presiding official's determinations on those issues would not affect the outcome of this

/ / /

appeal.*/ Accordingly, the Board hereby -" DENIES appellant's petition for review for failure to meet the criteria set forth at 5 C.F.R. § 1201.115.

The agency, in its petition, argues that the presiding official erred in finding that

*/ The Board has resolved the issues raised in the appellant's petition for review in the following cases: Ketchem v. Department of Transportation, MSPB Docket DA075281F0713 at 9 (May 28, 1982), motion for clarification denied (November 23, 1982) (official notice of the existence of an unlawful strike); Schapansky v. Department of Transportation, MSPB Docket DA075281F1130 at 6 n.2, 7-8 and 10-12 (October 28, 1982) (invocation of 5 U.S.C. § 7513 (b)(1) to shorten the notice period, prima facie case of strike participation, nexus, and reasonableness of the removal penalty); Johnson v. Department of Transportation, MSPB Docket No. DC075281F0998 at 10-12 (November 10, 1982) (standard for establishing a defense of coercion or duress); Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983) (meaningful opportunity for oral and written reply); Baracco v. Department of Transportation, MSPB Docket No. DC075281F0895 at 17 (April 25, 1983) (agency's failure to afford appellant not less than 7 days to respond to written notice of proposed removal does not, of itself, warrant reversal); Karapinka v. Department of Energy, 6 MSPB 114, 115-16 (1981)(procedural error by a presiding official); and Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980) (review of factual determination of the presiding official).

the agency suspended appellant during the pendency of his removal from Federal employment For the following reasons, we hereby GRANT the agency's petition under 5 U.S.C. $ 7701(e)(1). It is uncontested that on August 18, 1981, appellant contacted the facility chief and requested to be returned to work, but was not allowed to do so. See Initial Decision at 12. However, appellant's removal was effective August 28, 1981. The appellant was suspended for a period of 10 days. Since the Board lacks jurisdiction to entertain an appeal of an employee suspended for less than 14 days, see 5 U.S.C. $ 7501-7504, the Board has no authority to consider appellant's suspension claim under these circumstances. See Smith v. Department of Transportation, MSPB Docket No. DE075281F03 at 8 (August 24, 1983); Beatty v. Department of Transportation, MSPB Docket No. DC075281F0899 at 3 (August 9, 1983).

Accordingly, the presiding official's finding in the initial decision regarding th

suspension is REVERSED. That part of the initial decision sustaining appellant's removal is not affected by this opinion. This is the final order of the Merit Systems Protection Board in this appeal 5 C.F.R. §1201.113(c). The appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

SEP 30 1983

Robert E. Taylor
Secretary

Washington, D.C.

Attachment: Statement of the Board's policy on service of its opinions and orders.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RONALD E. OSWILL HOWARD W. SMITH WILLIAM M. HETHERINGTON, appellants, v. DEPARTMENT OF TRANS- PORTATION, agency.	DOCKET NUMBER SF075281F2169 SF075281F2159 SF075281F2708

ORDER

Having fully considered the appellants' and the agency's petitions for review of the initial decision in these appeals, dated January 19, 1983, the Board hereby DENIES the petitions for failure to meet the criteria for review set forth at 5 C.F.R. §1201.115.

All three appellants contend, inter alia, that they did not participate in the 1981 air traffic controller strike, but were absent from work on the specific days they were charged with strike participation because of coercion. The Board, however,

finds the presiding official correctly determined that appellants did not establish coercion. See Johnson v. Department of Transportation, MSPB Docket No. DC075281F0998 at 11-12 (November 10, 1982).

Specifically, the Board defers to the presiding official's adverse credibility determination with respect to appellant Oswill. See Weaver v. Department of the Navy, 2 MSPB 297, 298 (1980). The Board finds that his credibility determination detracts from any significance which might otherwise be attached to Oswill's testimony concerning threatening telephone calls and a direct physical threat made by a union member on August 5, 1981.

Similarly, the Board finds that the testimony of a former controller, that he told appellant Hetherington that if he did not support the strike his house might be bombed, does not establish coercion. The former controller testified that the remark, although in poor taste, was made in jest.

Hearing Transcript at 98-99. Moreover, there was no evidence establishing that the "bombing" comment was the cause of appellant's asserted intimidation. He did not allude to it in his oral and written replies to the agency, Official File, Tab 3, nor testify at the hearing with respect to the comment's effect.*/

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*/ The remaining issues raised in the petitions for review by appellants and the agency have been resolved in the following cases: United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (1971) aff'd 404 U.S. 802 (1971) (constitutionality of 5 U.S.C. §7311(3)); Schapansky v. Department of Transoortation, MSPB Docket No. DA075281F1130 at 6 n.2, 7-8, 10-12 (October 28, 1982) (prima facie case of strike participation and burden of proof, invocation of 5 U.S.C. §7513(b)(1) to shorten notice period, reasonableness of removal penalty, and efficiency of the service); Noa v. Department of Transportation, MSPB Docket No. NY075281F0697 at 12-13 (April 25, 1983)(concerted activity); Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983) (meaningful opportunity to reply to removal proposal); Martel v. Department of Transportation, MSPB Docket No. BN075281F0558 at 6-7 11-12 (April 25, 1983) (suspension during removal notice period); Smith v. Department of Transportation, MSPB Docket No. DE075281F0337 at 6-7 (August 24, 1983) (waiver of timeliness regulation for claims of constructive suspension); Baracco v. Department of Transportation, MSPB Docket No.
[Footnote Continued On Following Page]

This is the final order of the Merit Systems Protection Board in these appeals. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. §1201.113(b).

Proof of compliance with this Order

(footnote * continued)

DC075281F0895 at 13 (April 25, 1983) (procedural errors must be harmful); Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980) (deference to presiding official's findings of fact, and insufficiency of mere disagreement with findings to warrant review); Bodinus v. Department of Treasury, 7 MSPB 385, 389 (1981) (proof necessary for finding a prohibited personnel practice); Adams v. Department of Transportation, MSPB Docket No. NY075281F0424 at 3-5 (April 25, 1983), and Stone v. Office of Personnel Management, 5 MSPB 142, 143 (1981) (failure to impose sanctions for inadequate compliance with discovery request).

In their petitions for review, and in appellant Oswill's response to the agency's petition in his case, the appellants improperly request attorney fees. Such requests must be made to the presiding official within ten (10) days after a decision becomes final. 5 C.F.R. §1201.37(a)(2).

Finally, in answer to the agency's assertion that the Board does not have jurisdiction to order awards of backpay, the Board notes that the presiding official's action with respect to Oswill was to cancel his suspension. It was not an award of backpay.

shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the San Francisco Regional Office in accordance with 5 C.F.R. §1201.181(a).

Each appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review of the Board's action by filing petitions for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Petitions for judicial review must be received by the court no later than thirty (30) days after the appellants' receipt of this order.

FOR THE BOARD:

SEP 30 1983

ROBERT E. TAYLOR
Secretary

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT E. HENRY Appellant v. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINSTRATION, Agency	DOCKET NUMBER SF075281F2513

OPINION AND ORDER

Appellant filed a timely petition for appeal with the Board's San Francisco Regional Office from a decision of the Department of Transportation's Federal Aviation Administration (agency) removing him from his GS-11 position as an Air Traffic Controller Specialist. 1/

1/ This appeal was initially consolidated with eleven other appeals for a hearing. See Master File with the appeal of John A. Crane v. Department of Transportation, MSPB Docket No. SF075281F2514 (January 20, 1983)

The removal was based on charges of strike participation and unauthorized absence (AWOL).

In an initial decision dated January 21, 1983 the presiding official found that the agency established a prima facie case of appellant's strike participation and that appellant failed to rebut this case by establishing a defense of coercion or duress. Initial Decision (I.D.) at 9. The presiding official therefore sustained the removal action. The presiding official also found, however, that the appellant was entitled to be placed in a pay status for part of the notice period pending his removal pursuant to 5 C.F.R. §752.404(d)(1) because appellant had established that he was ready, willing and able to work during that period. I.D. at 13.

Both the agency and the appellant have filed petitions for review and each

party has responded to the other party's petition.

In his petition for review, the appellant asserts that the presiding official erred in finding that the appellant failed to establish a defense of coercion or duress. Specifically, appellant contends that he lacked any intent to strike and that his absence was due to "stress, anxiety and fear for the safety of himself, his family, and his career." Appellant's Petition at 15. Appellant alleges that about a month before the strike, two controllers from the Los Angeles Tower who were members of the Professional Air Traffic Controllers Organization (PATCO) came to his facility while he was working and told him that if he did not participate in the strike "he knew what would happen

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to him." Hearing Transcript (H.T.) at 139. 2/ Appellant did not testify during the hearing but the appellants' witnesses included a supervisor and a co-worker who were present during this incident. Both witnesses testified that the conversation between the appellant and the PATCO controllers was forceful or heated (H.T. at 124, 134). Appellant's co-worker also testified that during this conversation one of the PATCO controllers pushed or jabbed the appellant on the shoulder to emphasize a point. H.T. at 134-5. Appellant's supervisor, however, testified that he did not recall observing any physical contact between the appellant and the two PATCO controllers during the incident. H.T. at 145. Appellant's wife

2/ A consolidated hearing was held on November 1-2, 1982 and appellant's individual hearing was held on December 2, 1982. Unless otherwise indicated, transcript references are to the December 2 hearing.

also testified that during the week before the strike she or appellant received several phone calls from callers who would not identify themselves or say anything and would then hang up. H.T. at 150. She further testified that appellant received a phone call on August 2 in which the caller hung up after asking "Who's going to watch your wife while you're at work?" Appellant's witnesses testified that these incidents caused appellant to be afraid for his own safety and that of his wife, and that appellant was afraid his career would also be jeopardized if he did not support the strike. H.T. at 126-30, 133, 139-41, 143-4, 155, 159-60. The chief of the facility where appellant worked testified that the appellant called him on August 3 and told him that he was not going to report for duty because of the number of controllers who had gone on strike and because of his

concern for his safety and his family's safety. H.T. at 100. Although appellant alleged that he asked the facility chief for protection or assistance in order to report to work, the facility chief stated that he did not recall appellant asking for assistance. H.T. at 119.

After reviewing the evidence concerning appellant's claim of coercion, the presiding official found that it did not meet the standard for duress or coercion set forth in Johnson v. Department of Transportation, MSPB Docket No. DC075281F0998 at 11-12 (November 10, 1982). Based upon our review of the record, we conclude that there are a number of factors that weigh against a finding of coercion, and we therefore find no reason to disturb the presiding official's finding in this regard.

First, we note that even the

testimony of appellant's witnesses which was most favorable to appellant falls considerably short of establishing that appellant received "threats or other intimidating conduct . . . sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist." Johnson, supra at 11-12. Appellant adduced no testimony or evidence tending to establish that the PATCO controllers' statement that appellant "knew what would happen to him" if he did not participate in the strike was a threat which would instill a reasonable fear of physical harm. Appellant's supervisor testified that he had lunch with the appellant shortly after the incident and that appellant told him that the PATCO controllers advised the appellant he would never be "checked out" at another facility if he didn't participate in the

strike. H.T. at 139-40. Moreover, we note that a significant portion of the testimony of appellant's witnesses focused on appellant's fear that his career would be harmed if he did not participate in the strike. H.T. at 126-30, 133, 139-41, 143-4, 155. In view of these facts, and in the absence of appellant's testimony, we conclude that a fair reading of the discussion between the appellant and the two PATCO controllers is that the appellant was not threatened with physical harm, but was threatened with jeopardy to his career. Second, we find that the circumstances that surrounded the alleged threat to appellant's wife weakened appellant's claim regarding this incident. Appellant's wife testified that an unidentified person called appellant on the evening before the scheduled strike and asked "Who's going to watch your wife while you're at

work?" H.T. at 151-2. Appellant's wife further testified that appellant called the facility chief the next day and asked for security in order to report to work and was told that no security could be provided. H.T. at 153. In contrast, the facility chief testified that he did not recall that appellant asked for protection. H.T. at 119. There is no testimony to the effect that appellant informed the facility chief about the alleged threat to his wife. We find that appellant's failure to inform the facility chief about this alleged threat in the course of a conversation in which the appellant claims that he requested security seriously diminishes the credibility of appellant's claim of coercion regarding the incident. Third, we note that the facility chief testified that the facility where appellant worked was a small tower which was normally staffed with only five con-

trollers (November 2 H.T. at 294), and that there was no picketing or incidents of violence at the facility during the strike. H.T. at 101-2. Fourth, we note that despite the fact that appellant contends that his participation in the strike was involuntary because PATCO controllers intimidated and coerced him, appellant nevertheless designated a PATCO official as his representative both in his response to the agency and in his petition for appeal to the Board, and appellant also submitted form letters supplied by PATCO in his agency response and in his petition for appeal. I.D. at 6. We find that the above factors represent inconsistencies or improbabilities which significantly weaken appellant's claims of coercion. We therefore find no reason to disturb the presiding official's finding that appellant failed to establish a defense of coercion.

In his petition for review, appellant also contends that: 1) the laws and regulations regarding striking and AWOL offenses are ambiguous and should not therefore be enforced; 2) the appellant's removal violates the merit principles contained in 5 U.S.C. §2301 et seq.; 3) the appellant's removal is a prohibited personnel practice under 5 U.S.C. §2302(b) because appellant's absence was an effort on his part to disclose agency mismanagement; 4) judgment should have been entered against the agency before the hearing because of the agency's failure to answer the appellant's interrogatories; and 5) the presiding official's denial of appellant's request to call certain witnesses was reversible error. We find that the appellant has not provided sufficient evidence or argument in support of these contentions to demonstrate any legal or factual error by the

presiding official. 5 C.F.R. §1201.115.

In their petitions for review, both the appellant and the agency challenge the presiding official's finding that the appellant was entitled to back pay during part of the notice period not to exceed ten days pursuant to 5 C.F.R. §752.404 (d)(1). I.D. at 12-13. 3/ The presiding official found that the appellant contacted the facility on August 24 and expressed a desire to return to work, and the presiding official therefore ordered the agency to alter it records and place the appellant in a pay status not to exceed ten days, from August 24 until September 1, the date of appellant's removal. I.D. at

3/ 5 C.F.R. §752.404(d)(1) provides in pertinent part that when an agency takes a removal action or a suspension action and shortens the notice period by invoking the crime exception pursuant to 5 U.S.C. §7513(b)(1), the agency "may place the employee in a nonduty status with pay for such time, not to exceed ten days, as is necessary to effect the action."

12-13. The appellant contends that the presiding official erred in limiting appellant's pay status to ten days and that appellant should have been awarded back pay for the entire notice period or, alternatively, from August 3-September 1 because appellant allegedly told his facility chief he wished to return to work on August 3. Appellant's Petition at 29-30. In contrast, the agency contends in its petition for review that the presiding official's ruling was tantamount to an erroneous finding that appellant was suspended; that the presiding official misapplied applicable law and regulations governing this issue; that the record does not support the presiding official's finding that the appellant was ready, willing and able to work on August 24; and that the Board has no jurisdiction over this issue because the appellant did not raise the issue in a timely fasnion.

Pursuant to 5 U.S.C. §7701(e), the Board hereby GRANTS the agency petition for review.

Based upon our review of the record, we find that appellant raised the issue of his status during the notice period in pleadings filed before his hearing and at his hearing. See Statement of Facts, Issues, and Defenses, Tab 1, Appeal File and H.T. at 178. We find that this issue was therefore properly before the Board despite appellant's failure to include this issue in his petition for appeal. Smith v. Department of Transportation, MSPB Docket No. DE075281F0337 at 7 (August 24, 1983).

We find, however, that we agree with the agency's contention that the record is devoid of any support for the presiding official's finding that appellant contacted his facility chief on August 24 and expressed a desire to

return to work. Although the record reflects the fact that the appellant made his oral response to the agency on August 24, the summary of his response prepared by the agency does not support the finding that he asked to return on August 24, and the appellant has not disputed the accuracy of the summary. See Appeal File, Tab 1. Also, we note that none of the agency witnesses or appellant's witnesses testified concerning appellant's alleged desire to return on August 24. H.T. at 96-102. Further, we find no merit in appellant's contention in his petition for review that he should have been placed in a pay status starting with August 3 because appellant allegedly called the facility chief on August 3 and communicated that he was ready, willing, and able to return at that time. Appellant's Petition at 5. Although the facility chief testified that appellant did call

him on August 3, the chief stated that appellant indicated he would not report because of the number of controllers who were out and because of appellant's concern for his own safety and his family's safety. H.T. at 100. Appellant did not rebut the facility chief's testimony and we find that this evidence does not demonstrate the requisite showing that appellant unequivocally notified the agency that he was ready, willing, and able to return to work. See 38 Comp. Gen. 203 (1958); Armand v. U.S., 136 Ct. Cl. 339(1956); see also Martel v. Department of Transportation, MSPB Docket No. BN075281F0558 at 11-12 (April 25, 1983). Moreover, we find that it is disingenuous of the appellant to assert that his August 3 conversation with the facility chief demonstrated his desire and readiness to report for work, on the one hand, and to contend that this same conversation also demonstrated

that his absence was involuntary because of fear and duress, on the other hand.

Accordingly, the initial decision dated January 21, 1983, is hereby REVERSED as to the presiding official's finding that appellant was entitled to be placed in a pay status from August 24 - September 1, 1981, and AFFIRMED as to the removal action. Appellant's removal is hereby SUSTAINED. The Board further finds that appellant's petition for review fails to meet the criteria for review set forth at 5 C.F.R. §1201.115 and we hereby DENY the petition. 4/

4/ The Board has resolved the other issues raised by the appellant in his petition for review in the following cases: Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2, 7-8, 8-12 (October 28, 1982) (prima facie) case of strike participation, invocation of 5 U.S.C. §7513 (b)(1) to shorten the notice period, reasonableness of the removal penalty and nexus between striking and efficiency of the service); Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 7-8 (April 25, 1983) and Campbell v. Department of Transportation, MSPB

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. §1201.(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

(footnote 4 continued)

Docket No. DE075281F0674 at 15-16 (April 25, 1983) (confusion as to the deadline shift); Baracco v. Department of Transportation, MSPB Docket No. DC075281F0895 at 13-14 (April 25, 1983) (effect of procedural errors in general on agency action). See also Malone v. Department of Justice, MSPB Docket No. DA03518210042 at 3 (January 19, 1983) (Board's lack of authority to determine constitutionality of statutes); Karapinka v. Department of Energy, 6 MSPB 114,115-16 (1981) (reversible error by presiding official).

FOR THE BOARD:

_____ _____

(Date) Robert E. Taylor

Secretary

Attachment: Statement of Board Policy on service of its opinions and orders.

OPINION OF BOARD MEMBER

DENNIS M. DEVANEY

DISSENTING

FROM THE OPINION AND ORDER

I believe that appellant has successfully established a defense of coercion or duress. Appellant testified that he and his family had been personally threatened with violence. The testimony of a co-worker that appellant was jabbed or pushed by PATCO controllers prior to the strike lends credence to appellant's concern for his safety and that of his family.

In my view, the showing made by appellant meets the coercion standard set out by the Board in Johnson v. Department of Transportation, MSPB8 Docket No. DC075281F0998 (November 10, 1982) as applied in Hennelly v. Department of Transportation, MSPB Docket No.

NY075281F1452 (November 28, 1983) and Albert v. Department of Transportation, MSPB Docket No. BN075281F0229 (January 17, 1984).

Therefore I respectfully dissent.

_____ _____

(Date) Dennis M. Devaney

Member

Washington, D. C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL J. HOULIHAN	)	
v.	)	DOCKET NUMBER SF075281F2579
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION	)	

OPINION AND ORDER

The Department of Transportation, Federal Aviation Administration (agency) removed the appellant from his position as Air Traffic Control Specialist at its air traffic control facility in Los Angeles, California. The agency based the removal action of charges of participating in a strike against the United States government, and unauthorized absence. On appeal of the removal action to the Board's San Francisco Regional Office, the presiding official designat-

ed to adjudicate the matter sustained the removal in an initial decision dated January 21, 1983. 1/ The presiding official also found that appellant was improperly suspended from August 19 to August 28, 1981.

Both appellant and the agency have petitioned the Board for review of the presiding official's initial decision. Upon consideration of appellant's petition, we find that the majority of the legal issues raised have been addressed by the Board in other related

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1/ The appeals of twelve appellants were consolidated for hearing in this matter and a separate decision was issued for the above appellant.

cases 2/ that the presiding official's findings as to those legal issues are essentially consistent with ours, and that any inconsistency in the presiding official's determinations on those

2/ The Board has resolved those issues in the following cases: Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2, 11-12 (October 28, 1982) (prima facie case of strike participation, reasonableness of the removal penalty, and efficiency of the service); Johnson v. Department of Transportation, MSPB Docket No. DC075281F0998 at 8-9, 11-12 (November 10, 1982) (coercion); Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983) (meaningful opportunity for oral reply and invocation of 5 U.S.C. § 7513(b) to shorten notice period).

Further, appellant's petition fails to establish that the presiding official committed reversible error by finding that appellant failed to establish any affirmative defense, by denying appellant's request to call certain witnesses to testify, or by refusing to impose sanctions against the agency. Appellant merely restates arguments raised below with regard to these issues, without specific references to the record as required under 5 C.F.R. 1201.115. Further, appellant's mere disagreement with the presiding official's actions are insufficient grounds for granting review. Karapinka v. Department of Energy, 6 MSPB 114 (1981).

issues would not affect the outcome of this appeal.

In addition, to the extent that the arguments made in appellant's petition relate to the presiding official's factual determinations, 3/ we find that appellant has not demonstrated any material factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, at 299-300 (1980).

Both appellant and the agency argue that the presiding official erred in finding that appellant was improperly suspended for ten days during the removal notice period. Appellant argues that he was improperly suspended from August 10, the date he received the

3/ Appellant's major argument in this regard contests the presiding official's findings concerning the extent and nature of appellant's allegation of coercion.

notice of proposed removal, until August 28, the date the removal became effective. He, therefore, contends that the presiding official erred by finding that appellant's improper suspension began on August 19, when he notified his facility chief that he was ready, willing, and able to return to work. The agency contends, among other things, that appellant's ten-day suspension is not within the Board's appellate jurisdiction.

In order to establish a constructive suspension, appellant must show that he was ready, willing, and able to return to work. Martel v. Department of Transportation, MSPB Docket No. BN075281F0558 at 11 (April 25, 1983). As the presiding official found, appellant made this showing at his oral reply on August 19. Thus, the alleged improper suspension occurred from August 19 until August 28. See Campbell v. Department of

Transportation, MSPB Docket No. DE075281F0674 at 18-19 (April 25, 1983). As the agency correctly argues, however, the Board lacks jurisdiction for this ten-day suspension and the presiding official, therefore, erred in ordering the agency to place appellant in pay status for that period of time. 5 U.S.C. § 7512(2).

Accordingly, appellant's petition for review is DENIED, the agency's petition for review is GRANTED, the initial decision is hereby REVERSED as to the presiding official's finding that the agency suspended appellant from August 19 to August 28, 1981, and AFFIRMED as to the removal action. Appellant's removal is hereby SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. §1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

_____ (Date)

_____
Robert E. Taylor
Secretary

Washington, D.C.

Attachment: Statement of the Board's policy on service of its opinions and orders.

APPENDIX "I"

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

WILLIAM S. RUSSELL,	)	Appeal Nos.
WILLIAM M. HETHERINGTON,	)	85-1128,
ROBERT E. HENRY,	)	85-1129,
DANIEL J. HOULIHAN, and	)	85-1130,
RONALD E. OSWILL,	)	85-1131,
	)	and 85-1132.
Petitioners,	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION, FAA,	)	
	)	
Respondent.	)	

DECIDED: August 30, 1985

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, and NIES, Circuit Judge.

PER CURIAM.

On the basis of the Merit Systems Protection Board's opinion in each of these cases, we affirm the board's decision sustaining removal of petitioners for participation in a strike

and unauthorized absence. 5 U.S.C. § 7703(c) (1982).

Petitioner Russell argues that his absence from work was involuntary due to his fear of not becoming certified in retaliation for failure to join the strike. However, such an argument was rejected in Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed. Cir. 1984). See Martel v. Department of Transportation, FAA, 735 F.2d 504 (Fed. Cir. 1984). Petitioner argues further that his absence was due to "intense fear and anxiety over the chance that he would endanger himself [and] his family . . . if he defied PATCO and reported for work during the strike." However, he told his supervisor that no specific threats were made to him personally and, as the Government points out, raised the point of being threatened with physical harm for the first time in his brief on appeal. Moreover, his psychiatrist

testified that he (Russell) never mentioned fear from physical harm. Finally, petitioner argues that even if his fear was not such as to render his absence from work involuntary (i.e., did not satisfy the objective "reasonable person" test prescribed by Johnson), his subjective fear was sufficient to rebut the Government's prima facie case of voluntary withholding of services in concert with others. However, assuming arguendo that petitioner was motivated by unreasonable fear,1/ to permit his withholding of services (simultaneously with such action by other employees) to escape sanction would as a practical matter render the objective "reasonable person" test a nullity.

Petitioner Hetherington argues that he was confused and thought his employ-

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1/ We note that petitioner admitted that he engaged in picketing.

ment was terminated when he received a telegram, which stated that a strike was in progress, participation could result in removal, and that he should report for duty. We agree with the MSPB's observation that this contention is without merit. Petitioner's argument based on coercion lacks specifics and is fully met by the board's opinion. See Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Johnson v. Department of Transportation, FAA, 735 F.2d 510.

Petitioner Henry argues that he failed to report for work because of coercion due to concern that he would not be certified in retaliation for working and due to fear of danger to himself and his wife, notwithstanding that there was no picketing at his facility, no reports of violence, and no reports of threats to any of the control-

lers. The opinion of the MSPB, citing, inter alia, Schapansky and Johnson, supra, provides ample support for petitioner's removal.

Petitioner Houlihan makes the same argument of coercion due to concern that he would not be certified and due to fear for his own safety, although he did not receive any personal threats. The MSPB properly rejected the argument, citing, inter alia, Johnson.

Petitioner Oswill argues that he was coerced into being absent without leave by harassing and intimidating phone calls, although he admitted that he knew of a controller who had reported for work after having been subjected to harassment. The MSPB found that Oswill had not shown his asserted fear to have been reasonable, and we are satisfied that substantial evidence supports the board. See Johnson, supra. The board also found that Oswill deliberately took

medication on August 3 and 4 of 1981 so that he would not be able to perform his duties as an air controller; that he reported for his regularly scheduled shifts on those days and was not required by his tower chief to control air traffic; that on August 5 he telephoned his facility to request sick leave, but did not contact the tower chief, who had to approve such a request; that he then went to a union meeting place where he was photographed engaging in picketing; and that he was absent without leave for his scheduled shift beginning at midnight on August 6. Such activities by an air controller with twelve years' experience could reasonably tend to diminish his credibility before the MSPB--not only with respect to his asserted harassment, but also regarding his claimed belief that he was not scheduled for the shift beginning at midnight on August 6.

Counsel for all of the petitioners, incredibly, relies upon Schapansky, supra, and Letenyei v. Department of Transportation, FAA, 735 F.2d 528 (Fed. Cir.), aff'd original decision on remand, 23 M.S.P.R. 19 (1984), aff'd, No. 85-745 (Fed. Cir. July 18, 1985), for the proposition that the agency is required to show proof of specific intent as an element of its prima facie case. This court stated in Schapansky that "[n]either participation in strike planning nor express agreement with others to perpetrate the strike is a necessary ingredient of proof that a particular employee participated in a strike. . . . [P]roof of general intent suffices. Unexplained absence during a strike of general knowledge establishes that the employee 'intended' to strike." 735 F.2d at 483. Contrary to counsel's assertion, the court's first Letenyei opinion merely described the adequacy

with which the board must explain its reasons for rejecting the Presiding Official's determination that petitioner had rebutted the agency's prima facie case. Upon consideration of the merits in Letenyei the court held that petitioner had not rebutted the agency's prima facie case.

Because the arguments of petitioners are adequately met by precedents of lead cases and/or are patently frivolous in light of the record before the court, we assess attorney fees and costs of $500 against petitioner and counsel, jointly and severally, in each of the appeals.

AFFIRMED

APPENDIX "J"

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

WILLIAM S. RUSSELL,	)	No. 85-1128
WILLIAM M. HETHERINGTON,	)	85-1129
ROBERT E. HENRY,	)	85-1130
DANIEL J. HOULIHAN and	)	85-1131
RONALD E. OSWILL,	)	85-1132
Petitioners	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORT-TATION, FEDERAL AVIA-TION ADMINISTRATION,	)	
Respondent.	)	

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATIOIN THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart, Clerk

October 17, 1985

cc: Mark E. Beck
Sandra P. Spooner

CERTIFICATE OF MAILING

I hereby certify that on this date I have placed in the United States mail, postage prepaid, a true copy of the above document addressed as follows:

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Dated: January 15, 1986

Respectfully sumitted,

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By_____
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Attorneys for Petitioners

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1229

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM S. RUSSELL, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the decisions of the Merit Systems Protection Board sustaining petitioners' removal for participating in a strike against the United States and for being absent without leave.

2. Whether the court of appeals correctly assessed attorney fees and costs of $500 jointly and severally against each petitioner and their counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1229

WILLIAM S. RUSSELL, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I1-I8) is reported at 771 F.2d 493. The opinions of the Merit Systems Protection Board (separately paginated in Pet. App. H) are reported in the Merit Systems Protection Reporter.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1985. Petitioners' petition for rehearing was denied on October 17, 1985 (Pet. App. J1). The petition for

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[1] *Russell* v. *Department of Transportation*, 17 M.S.P.R. 210 (1983); *Houlihan* v. *Department of Transportation, FAA*, 17 M.S.P.R. 229 (1983); *Oswill* [and *Hetherington, et al.*] v. *Department of Transportation*, 17 M.S.P.R. 348 (1983); *Henry* v. *Department of Transportation, FAA*, 19 M.S.P.R. 70 (1984). The decisions of the Board's presiding officials in these cases (separately paginated in Pet. App. G) are unreported.

a writ of certiorari was filed on January 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the subsequent litigation are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation, FAA*, No. 84-78, in response to one of a number of other petitions arising out of the strike.[2]

1. Petitioners were removed from their positions as air traffic controllers on the grounds that they participated in a strike against the United States and were absent without leave during the strike. They appealed to the Merit Systems Protection Board (MSPB or Board), where they were afforded a hearing. The agency established a prima facie case of strike participation by demonstrating that petitioners were absent without leave during a strike of general knowledge.[3] Petitioners contended before the Board that they did not voluntarily participate in the strike, but rather were absent under duress.

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[2]A copy of our response in *Campbell* has been sent to counsel for petitioners.

[3]The standard applied below requires that the agency at all times bear the burden of persuasion with respect to strike participation; the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482-483 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Once the agency has made a prima facie showing by evidence of the employee's unauthorized and unexplained absence during a strike of general knowledge, "the burden of going foward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing." 735 F.2d at 482.

a. Petitioner Russell had been scheduled for annual leave on August 2 and 3, 1981. His supervisor telephoned him early on August 3, the first day of the strike, and told him that his annual leave was cancelled. Russell responded by saying, " 'I think you know my position,' " and did not report for work on August 3 or thereafter. Pet. App. G14-G15 (Russell).[4] In response to the agency's notice proposing his removal, Russell claimed that he absented himself because he was a trainee and believed that the union would impede his professional advancement if he did not join its strike (*id.* at G15-G16).[5] Russell admitted that no threats were made to him personally, however. The record contains no direct evidence to support his allegations; Russell did not testify in his own behalf at the Board hearing (*id.* at G17-G18). Rather, he submitted the testimony of his psychiatrist, who said simply that Russell was generally "fearful" about his future as an air traffic controller; the psychiatrist also testified that Russell was unable to make a decision about whether to participate in the strike, and that Russell had never mentioned any fear of physical or personal harm (*id.* at G18-G20).

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[4]All of the presiding officials' decisions are contained in Appendix G to the petition; since this portion of the appendix is not consecutively numbered, our citations will refer to page numbers within the decision indicated—*e.g.*, "Pet. App. G15 (Russell)."

[5]It was not until Russell appealed to the court of appeals that he alleged that he was also concerned about his safety (see Pet. App. I2). The only record evidence cited in support of this claim was his written response to the agency's proposal to remove him, which was devoted almost exclusively to his claim that he feared damage to his career. The only reference to a fear of physical harm was his assertion that, after June 1981 but before the August 1981 strike, " '[t]hreats both physical and career oriented were made to scabs and those who were not supportive of the strike.' " See Resp. Statement in Lieu of Br. 6-7.

b. Petitioner Hetherington was removed for striking on August 4 and 5, 1981 (Pet. App. G37 (Hetherington)). On August 3, 1981, his day off, Hetherington received a telegram from the FAA advising him that a strike was in progress and that he should report for duty; he did not (*id.* at G38). When Hetherington responded to the agency's notice proposing his removal, he claimed that he was confused and/or coerced (*id.* at G37-G38). No specifics of the coercion defense were provided, however: Hetherington elected not to testify, and proffered only the hearsay testimony of individuals who stated that he had told them that he was apprehensive and fearful regarding the strike (*id.* at G38-G39).

c. Petitioner Henry was charged with strike participation beginning on the first day of the strike, August 3, 1981, and continuing through the date of his notice of proposed removal, August 6, 1981 (Pet. App. G18-G19 (Henry)). Henry also alleged that he acted under duress in being absent without leave during the strike, but he too elected not to testify to this effect (*id.* at G20-G21, G27). Instead, his counsel contended that Henry was fearful and that his fears were based upon an alleged incident in which two union members threatened him and one grabbed him around the neck (*id.* at G21-G23). However, another air traffic controller who was present during the incident testified that one of the pro-strike controllers may have pushed or jabbed Henry on the shoulder only to make a point (*id.* at G23-G24). (This controller also testified that he experienced the same pressures but decided not to participate in the strike because he had too much to lose (*id.* at G24).) Henry's supervisor, who witnessed the incident as well, testified that no physical contact was made (*id.* at G25). The agency official charged with deciding whether to remove Henry investigated the incident and found that the two (non-threatening) controllers present remembered the discussion, but did not recall any physical or violent contact

(*id.* at G21-G22). He testified that he had received no reports of threats or violence at Henry's facility (*id.* at G21).

d. Petitioner Houlihan was charged with striking beginning on the first day of the strike, August 3, 1981 (Pet. App. G15-G16 (Houlihan)). He responded to the agency's charges by claiming that he feared he would not progress as a trainee controller if he did not participate in the strike (*id.* at G16-G18). Houlihan also alleged that he feared for his personal safety (*id.* at G19). He admitted he had not received any threats directed toward him, but claimed he had heard rumors of threats to other controllers (*id.* at G19-G20).[6] He admitted participating in picketing (*id.* at G20).

e. Petitioner Oswill was removed for striking on August 6, 1981 (Pet. App. G29 (Oswill)). He admitted in his response to the agency's notice of proposed removal that he deliberately took disqualifying medication on August 3 and 4 so that he would be disqualified from working his scheduled shifts on the first two days of the strike (*id.* at G33-G34). Nevertheless, his supervisor arranged for transportation so that he could come to work and allowed Oswill to sleep on duty on those days (*id.* at G35). On August 5, Oswill called to request sick leave, was told that only his supervisor could approve sick leave, and then never contacted his supervisor. Instead, Oswill went to the union headquarters that day and appeared at the picket line (*ibid.*). He did not report for his next regularly scheduled shift on August 6 (*id.* at G29-G30). Oswill contended before the Board that his unauthorized absence during the strike was the result of duress. He claimed that he had previously been subjected to verbal abuse and social ostracism and that

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[6]While Houlihan contended that a strike supporter threatened to shoot anyone who returned to work during the strike, he also admitted on cross-examination that this statement was made after the strike began, that he had already begun to withhold his services, and that the threat was impersonal and indirect (Pet. App. G20 (Houlihan)).

he and his wife had received threatening telephone calls (*id.* at G32).

2. a. The Board's presiding officials rejected the coercion claim of each petitioner.

Each decision noted that the legal standards to be applied to claims of coerced participation in a strike against the government were set forth by the Board in *Johnson* v. *Department of Transportation, FAA*, 13 M.S.P.R. 652 (1982), aff'd, 735 F.2d 510 (Fed. Cir. 1984). In *Johnson*, the MSPB adopted and the court of appeals approved a "reasonable man" standard for establishing involuntary participation in a strike. The Board found (13 M.S.P.R. at 660 (footnotes omitted)):

> [I]n order for a Federal employee charged with participation in a strike against the Government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist.

Under this standard, "menacing tones or language, fear of 'financial ruin' or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act or a choice of inherently unpleasant situations, may not suffice to render involuntary" an individual's participation in a strike (*id.* at 658-659 (footnotes omitted)).

The presiding officials then concluded that none of the petitioners offered evidence of threats or other intimidating conduct directed toward him sufficient to meet the *Johnson* standard (Pet. App. G21-G22 (Russell), G35-G36 (Oswill),

G37-G39 (Hetherington), G27-G29 (Henry), G21-G23 (Houlihan)). Because petitioners failed to come forward with convincing evidence that their unauthorized absences were for reasons other than strike participation, the presiding officials found that the agency had proved the charges against petitioners by a preponderance of the evidence (see page 2 note 3, *supra*). On petitions for review filed by both parties, the full Board (decisions separately paginated in Pet. App. H) affirmed the decisions of the presiding officials to the extent they sustained petitioners' removals.[7]

b. Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. The petitions were among approximately 3,500 similar petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those "lead cases." On May 18, 1984, a five-judge panel of the court of appeals issued 11 decisions sustaining the removals of all but one of the petitioners in the lead cases.

A number of the unsuccessful petitioners filed petitions for a writ of certiorari; all were denied. See, *e.g.*, *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, No. 84-259 (Nov. 13, 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984). After this Court denied the petitions in the lead cases, the court of appeals lifted the stay of the other pending appeals.

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[7]The agency petitioned for review by the full Board of the presiding officials' decisions that petitioners Russell, Henry, and Houlihan were constructively suspended (and thus entitled to back pay) between the agency's notice proposing their removals and the agency's decision to remove them. On this issue, the full Board reversed and no further review was sought.

3. In one of the early decisions issued by the court of appeals after the stay was lifted, the court affirmed the decisions of the Board with respect to these petitioners (Pet. App. I1-I8).

The court of appeals noted, regarding petitioner Russell, that claims of duress relating to career advancement were rejected in its lead decisions in *Johnson* v. *Department of Transportation, FAA, supra*, and *Martel* v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984).[8] It pointed out that Russell had earlier admitted that no specific threats were made to him; that he did not argue that he was threatened with physical harm until his appeal; that he admitted picketing; that his psychiatrist testified Russell never mentioned

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[8]The petitioner in *Martel* had argued inter alia that his participation in the strike should be excused because he acted in the belief that he would experience on-the-job harassment from pro-strike controllers who could eventually ensure that he was suspended or removed from his position (735 F.2d at 509). The court rejected petitioner's contention that the Board's *Johnson* decision foreclosed the duress defense except where there were threats of *physical* harm. The court indicated, however, that it was only in "exceptional circumstances" that it "may" be possible to prove that strike participation was involuntary when the threats of harm were of a nonphysical nature (*id.* at 509 n.9), and that the proof of such threats must be "especially strong" since " '[s]triking against the government is a grave offense * * * and a criminal offense * * * [that] disrupts the functioning of the government itself' " (*id.* at 509 (quoting *Schapansky*, 735 F.2d at 484)). It noted that "[t]he goals of the strikers were 'to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety' " (*ibid.*). The court concluded (*ibid.*):

> Certainly, [petitioner's] vague and speculative worries of future job harassment, leading to possible job suspension or removal, fall far short of the type of objective evidence which would suffice. A person of ordinary firmness would reasonably be expected to resist such fears, rather than join an illegal strike for which the law provides criminal penalties.

fear from physical harm; and that his argument that subjective, even if unreasonable, fear should rebut the government's prima facie case would leave nothing of the *Johnson* "reasonable man" test. Pet. App. I2-I3. With respect to petitioner Hetherington, the court of appeals found that he had not met the standard of proof required by *Johnson* because his claim of coercion "lacks specifics and is fully met by the board's opinion" (*id.* at I3-I4). Regarding petitioner Henry's claims of coercion through fear of career damage and physical harm, the court noted that at his facility there were no reports of picketing, violence, or threats to any fellow controllers, and that the Board's opinion "citing, *inter alia*, *Schapansky* and *Johnson, supra*, provides ample support for * * * removal" (*id.* at I4-I5). The similar claim of petitioner Houlihan, who "did not receive any personal threats," was also held "properly rejected" (*id.* at I5). The court sustained the Board's finding that petitioner Oswill's alleged fear was unreasonable, in light of evidence diminishing his credibility (*id.* at I5-I6).

The court of appeals found "incredibl[e]" the fact that petitioners' counsel relied upon the court's decisions in the lead cases for his contention that the government was required to show "specific intent" as an element of its prima facie case. The court pointed out that the decisions upon which petitioners' counsel relied expressly stated that proof of general intent to strike was sufficient. Pet. App. I7-I8.

Finally, the court below concluded that, because "the arguments of petitioners are adequately met by precedents of lead cases and/or are patently frivolous," costs and attorney fees of $500 would be assessed, jointly and severally, against petitioner and counsel on each appeal (Pet. App. I8).

ARGUMENT

The decision of the court of appeals in this factbound dispute is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not merit further review. The evidentiary standard that petitioners challenge is mandated by the nature of their conduct and supported by settled precedent, and the assessment of $500 by the court of appeals is amply justified.

1. Petitioners' contention (Pet. 24-27) that the court below applied an improper standard of proof for establishing involuntary strike participation is insubstantial. The standard requires that an individual who claims that his strike participation was involuntary demonstrate that his fears and concerns were reasonable and that they were such that a person of ordinary firmness would not be expected to resist them. This standard is consistent with established precedent and is the product of the considered judgment of this Court and, now, the tribunals deemed by Congress to have the expertise necessary to hear and decide the appeals of federal employees against whom adverse personnel actions have been taken.[9]

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[9]The decisions of this Court and the old Court of Claims have consistently applied an objective standard for duress in similar cases. In a case involving a claim that dangerous conditions were believed to exist at a workplace so as to provide a limited exception to the no-strike obligation of private sector employees, this Court endorsed the objective test, holding that "[i]f the courts require no objective evidence that such [dangerous] conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers." *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 385-387 (1974). Cf. *United States* v. *Huckabee*, 83 U.S. (16 Wall.) 414, 432 (1872). The Court of Claims, one of the Federal Circuit's predecessors, also applied an objective standard for proving duress. See, *e.g.*, *Christie* v. *United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Leone* v. *United States*, 204 Ct. Cl. 334, 339 (1974); *McGucken* v. *United States*, 407 F.2d 1349, 1351 (Ct. Cl.), cert. denied, 396 U.S. 894 (1969). Petitioners do not assert that any court of appeals has used a different standard. See *United States* v.

The standard represents, in any event, a proper allocation of the burden of proof between the parties in view of the disruptiveness of petitioners' actions and the information available to each party to the proceeding. It is hard to overstate the disruption caused by petitioners' strike participation. It is reflected by the fact that a federal employee who engages in a strike violates the oath signed as a condition of his employment (5 U.S.C. 3333(a)) and commits a criminal offense punishable by imprisonment for up to one year (18 U.S.C. 1918). The reason for the oath and the criminal statute are not difficult to discern, and are particularly appropriate here given the sensitive nature of petitioners' positions. By definition, a strike disrupts the functioning of the government itself. Moreover, the "intentional goals" of the striking air traffic controllers "were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety." *Schapansky*, 735 F.2d at 484 (citing *PATCO* v. *Federal Labor Relations Authority*, 685 F.2d 547, 622 (D.C. Cir. 1982) (MacKinnon, J., concurring)).

It is not disputed that petitioners participated in the strike (see Pet. 7). They insist, however, that they should be excused if they were afraid to refrain from striking—no matter how unreasonable their fear and no matter how little objective evidence of intimidation they present. But the virtual impossibility of disproving a mental state[10] means that the standard petitioners demand would ensure that federal employees would almost never be removed for

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Thompson, 749 F.2d 189, 194 (5th Cir. 1984); *Illinois* v. *Board of Educ.*, 606 F. Supp. 385, 390 (N.D. Ill. 1985); *Onnen* v. *United States*, 524 F. Supp. 1079, 1085 (D. Neb. 1981).

[10]To sustain an employee's removal for misconduct, a federal agency must prove its charges by a preponderance of the evidence (5 U.S.C. 7701(c)(1)(B)).

strike participation. In light of the widespread disruption (and danger) caused by strike participation—voluntary or involuntary—this is an unworkable demand.

2. Petitioners also assert that the court of appeals erred in imposing sanctions against them because their claims were not frivolous, and that the imposition of sanctions here creates constitutional problems and will "chill" the zealous advocacy of counsel. These contentions are without merit.[11]

a. This Court should not entertain petitioners' fact-bound contention (Pet. 16-21) that the court of appeals erred in determining that their appeals were frivolous.[12] Petitioners are simply wrong in insisting that they presented

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[11]On March 10, 1986, this Court denied a petition for a writ of certiorari making a similar challenge to an assessment under Fed. R. App. P. 38. *Robinson* v. *Department of Transportation, FAA*, No. 85-951. Presumably, the court of appeals' assessment here was also under Fed. R. App. P. 38, although it could have been under 28 U.S.C. 1912 or 1927.

[12]Petitioners' cause is, of course, not aided by their insistence that they were confident they would succeed. Their contention (Pet. 20) that there is "not a shred of evidence" suggesting that they did not act in good faith is both irrelevant (Fed. R. App. P. 38 and 28 U.S.C. 1912 do not provide that sanctions can be imposed only upon a finding of bad faith) and inaccurate (petitioners knew or should have known that their appeal would be governed by the court of appeals' prior decisions). See *Bartel Dental Books Co.* v. *Mapleton House Books, Inc.*, No. 85-7754 (2d Cir. Mar. 12, 1986).

Nor can it be persuasively argued (Pet. 15) that, in deciding whether their appeals were frivolous, petitioners were entitled to rely on the court of appeals' decision to hold oral argument. The appeal had already been filed. In any event, Fed. R. App. P. 34(a) does not preclude oral argument in frivolous cases; it merely permits the court to decline to hear oral argument when an appeal is frivolous. A court may wish to hold oral argument although the case appears frivolous in order to offer counsel an opportunity to convince it otherwise.

Finally, asking for "substantial" relief cannot transform a frivolous claim into a nonfrivolous one (see Pet. 14, 20).

plausible evidence to the Board of direct threats to them.[13] It is therefore apparent that any objective review of the record in their cases would have demonstrated that they could not prevail in the face of the *Johnson* precedent. While it is true that the court of appeals in *Martel* suggested the possibility that non-physical intimidation might excuse

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[13]Petitioners' attempt (Pet. 6-7 n.4, 25-26 n.13) to support their contention is utterly unconvincing.

The petition makes no mention of petitioners Henry or Russell. The principal "threat" Henry received is discussed at pages 4-5, *supra*. Russell concedes (Pet. 4, 17 n.9) that he did not present any evidence of direct physical threats, and it is and was frivolous for him to contend that the testimony of his psychiatrist met the reasonable man standard (see page 2, *supra*).

Regarding petitioners Hetherington, Houlihan, and Oswill, the petition provides citations to excerpts from the record that were attached to their briefs below. A fair reading of those portions of the record shows that they do not support petitioners' claim.

Contrary to petitioner Hetherington's assertions, the evidence did not establish that he was coerced by a threat that his house would be blown up. Petitioner's friend testified at the hearing before the Board that he (the friend) jokingly spoke of "fragging" petitioner's house. Petitioner himself elected not to testify, so there is no evidence in the record of how seriously he took the remark or that his subsequent participation in the strike was precipitated by the remark. See also page 4, *supra*.

Petitioner Houlihan testified that he feared pro-strike controllers would jeopardize his career and that he was told that he would "be taken care of" if he worked during the strike. Petitioner was not the recipient of any direct threats of harm (see also page 5 note 6, *supra*). Indeed, he cites to that part of the record in which he testified that no direct threats were made. See also page 5, *supra*.

Petitioner Oswill's contention that he was directly threatened is also without support in the record. Petitioner bases his claim of intimidation on the fact that a mailbox was thrown through a window in his neighborhood—even though neither the mailbox nor the window was his own and he had absolutely no evidence or reason to believe that the incident was related to the strike or union activity. See also pages 5-6, *supra*.

strike participation, it noted at the same time that such a case would have to be "exceptional" and would require "especially strong" proof (735 F.2d at 509 & n.9). Under no circumstances could those criteria be met by the record in these cases: indeed, the court in *Martel* rejected allegations substantially identical to those made by the petitioners in these appeals.[14]

Petitioners also assert that the fact that the court of appeals' precedents mandated affirmance of the Board's decisions in their cases is not a sufficient ground upon which to impose sanctions for their appeal. This assertion must be placed in context. The approach adopted by the court of appeals for handling the literally thousands of appeals by air traffic controllers was specifically designed to decide common legal issues in the designated lead cases. This procedure benefitted both the parties and the court by establishing at the outset the legal criteria that would have to be met before a decision of the Board would be reversed. Counsel and litigants in the air traffic controller appeals were, as petitioners concede, warned on several occasions that they should not merely repeat arguments that had already been rejected by the court and that those who did so would be subject to sanctions.[15] In any event, this case does

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[14]As the court below explained (Pet. App. 17-18), petitioners' contention (Pet. 18-19) that they distinguished their cases from those before the court in the lead cases of *Schapansky* and *Letenyei* v. *Department of Transportation, FAA*, 735 F.2d 528 (Fed. Cir. 1984), was "incredibl[e]."

[15]Petitioners acknowledge (Pet. 13) that the court of appeals sent them three separate notices (collected in Pet. App. F) advising them of the consequences of filing and maintaining frivolous appeals and citing the court's precedents on the subject (*i.e.*, *Wright* v. *United States*, 728 F.2d 1459, 1460, cert. denied, No. 83-6869 (Oct. 1, 1984); *Beachboard* v. *United States*, 727 F.2d 1092, 1094-1095 (1984); *Connell* v. *Sears, Roebuck & Co.*, 722 F.2d 1542, 1553-1555 (1983); *Asberry* v. *United States Postal Service*, 692 F.2d 1378, 1382 (1982)). Moreover, in the

not involve an award made on the basis of a frontal attack on the court's precedents (conceding their applicability but asking that they be overruled, or for the express purpose of preserving the issue for this Court's review); rather, petitioners disingenuously denied the precedents' applicability and mischaracterized the record, forcing the court to review the record and cases with that handicap. In these circumstances, the court's imposition of modest sanctions was plainly permissible.

b. Petitioners contend (Pet. 21-24) that the standard employed to assess sanctions for taking frivolous appeals is impermissibly vague and chills zealous advocacy and litigants' First Amendment rights. Petitioners' argument suggests that no court can assess sanctions to compensate appellees or to protect its docket from the abuses inherent in frivolous appeals. Such a proposition is necessarily unsound. It is, moreover, especially unconvincing to assert that the standard applied to petitioners' cases was impermissibly vague. Their appeal was deemed frivolous because their cases were squarely governed by the decisions in the lead cases, and they had been repeatedly warned that an appeal under such circumstances would be subject to sanctions. Thus, even if it could be said that frivolous appeals generally are not easily identified, in this instance the court of appeals had announced in advance that an appeal such as petitioners' would be deemed frivolous. Therefore, petitioners' claim does not merit review by this Court.

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lead air traffic controller cases, the court twice (somewhat obliquely) warned counsel of its intention to impose sanctions where subsequent air traffic controller appeals were deemed frivolous in light of the lead case decisions. See *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 494, cert. denied, No. 84-258 (Nov. 13, 1984); *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524, 524 n.*, cert. denied, No. 84-258 (Nov. 13, 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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